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Physician Standing in Abortion Controversies

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Abstract

Western law has acknowledged the close relationship between patient and physician since the dawn of recorded history. In the nineteenth century, medical discoveries in the field of embryology exploded the common-law concept of quickening. Consequently, physicians played a key role in the promulgation and implementation of the criminal abortion statutes of the nineteenth century. During that time, physicians also replaced juries of matrons pursuant to a writ de ventre inspiciendo in criminal cases when women were subject to capital punishment. Subsequently, physicians' professional responsibility was vital to the implementation and application of abortion statutes to individual instances. Clearly, the historical advocacy by physicians for children en ventre sa mere has changed the course of American legal history. The doctor-patient relationship between physicians and children en ventre sa mere has been central in the advancement of legal protection for unborn children, which is historically inseparable from the advancements in their medical care. As such, the historical and present advocacy by physicians for said children en ventre sa mere, and their fundamental right to life, strongly supports a finding they have Article III third-party standing in federal abortion controversies.

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INTRODUCTION

In a case currently before the United States Supreme Court, *U.S. Food and Drug Administration v. Alliance for Hippocratic Medicine* and *Danco Laboratories, L.L.C. v. Alliance for Hippocratic Medicine*, Nos. 23-235, 23-236, the first question under consideration by the Court is whether the doctors and associations of doctors who oppose abortion have Article III standing to challenge. Whether a doctor-patient relationship gives rise to standing is hardly a new question. The Court has previous held that the circumstances of a doctor-patient relationship may satisfy the "case or controversy" requirement of Article III of the Constitution in some very notable cases [1-3], and although these cases may be asserting rights of a relatively recent vintage, western law has acknowledged the close relationship between patient and physician since the dawn of recorded history.

ANCIENT ATTITUDES

In the eighteenth century B.C., Babylonian king Hammurabi wrote, "If during a quarrel one man strike another and wound him, then he shall swear, 'I did not injure him wittingly,' and pay the physicians [4]. The evolution of the law in this regard took an important step out of the primordial legal swamp under the *leges regiae* (royal laws), of the foundational Kings of Rome, which relied upon the relationship between patient and physician in a key aspect pertaining to the perpetuation of citizenry-upon which the kingdom inherently dependent, as were the later republic and then empire. As recorded centuries later in The Digest of Justinian, "The Royal Law refuses permission for a woman who died during pregnancy to be buried before her unborn child is removed from her; and anyone who violates this law is held to have destroyed the hope of a living child by the burial of the pregnant mother [5]. Romulus's successor, Numa Pompilius, enacted this law in the 7th century B.C., enrolling the assistance of surgeons to aid the child's struggle to survive such extraordinary circumstances [6]. Correspondingly, in the 5th century B.C., the Roman Republic's institutional Twelve Tables acknowledged the unwritten law of posthumous children being legal heirs of its citizens [7]. Thus, the organic law [8], of Rome then developed with many consequential laws; e.g., the surgical delivery required by Numa Pompilius was included in the term "birth" under Roman law, per Dig. 28.2.12 (Ulpianus, *On Sabinus* 9) [9].

PHYSICIAN ADVOCACY IN THE NINETEENTH CENTURY

In the early nineteenth century, medical discoveries in the field of embryology exploded the common-law concept of quickening. In 1801 French physiologist Anthelme Richerand published a book, Elements of Physiology (translated into English and published in London in 1803) [10], containing his findings that a heartbeat could be detected about seventeen days after conception. America's Dr. Theodric Romeyn Beck cited Richerand, and others, in his influential 1823 book, [11],

ELEMENTS OF MEDICAL JURISPRUDENCE

The observations of physiologists tend also to prove the vitality of the foetus previously to quickening. According to Richerand [12], blood is perceived about the seventeenth day after conception, together with the pulsation of the heart, and not long after the different organs have commenced their development. The correctness of this statement is confirmed by the observations of Blumenbach, Magendie, and others. Mauriceau relates, that he saw a foetus of about ten weeks that was alive, moved its arms and legs, and opened its mouth [13]. [T]he fact is certain, that *the foetus enjoys life long before the sensation of quickening is felt by the mother*. Indeed, no other doctrine appears to be consonant with reason or physiology, but that which admits the embryo to possess vitality from the very moment of conception [14].

Dr. Beck, who argued that abortion prior to "quickening" was also murder, was cited by the attorney general for Pennsylvania in perhaps the first American common law case heard by a state supreme court in which the quickening criteria was disregarded, *Commonwealth v. Demain*, 1 Brightly 441, 443 (Jan. 1846), 6 Penn. Law Journal 28 (1846). The *Demain* case was subsequently cited by counsel for the commonwealth, and then cited by the Pennsylvania Supreme Court opinion, in *Mills v. Commonwealth*, 13 Pa. 631, 633 (Pa. 1852), "A count charging a wicked intent to procure miscarriage of a woman, "then and there being pregnant," by administering potions, &c., was held good on demurrer by the Supreme Court of this state; MS. Rep. January 1846." *Mills v. Commonwealth* was then relied on, with like result, in the North Carolina Supreme Court in *State v. Slagle*, 83 N.C. 630, 632 (1880).

Mills v. Commonwealth and *State v. Slagle* were cited by the Supreme Court in *Dobbs v. Jackson Women's Health Organization*, 597 U.S 215, 253, 142 S. Ct. 2228, 2255 (2022), as examples of a state cases that did not follow the quickening rule, "But the insistence on quickening was not universal, see *Mills*, 13 Pa., at 633; *State v. Slagle*, 83 N. C. 630, 632 (1880)." Moreover, the Supreme Court in Dobbs acknowledged the role of Dr. Beck and other physicians for the abandonment of the quickening rule:

At any rate, the original ground for the quickening rule is of little importance for present purposes because the rule was abandoned in the 19th century. During that period, treatise writers and commentators criticized the quickening distinction as "neither in accordance with the result of medical experience, nor with the principles of the common law." F. Wharton, Criminal Law §1220, p. 606 (rev. 4th ed. 1857) (footnotes omitted); see also J. Beck, Researches in Medicine and Medical Jurisprudence 26–28 (2d ed. 1835) (describing the quickening distinction as "absurd" and "injurious"). In 1803, the British Parliament made abortion a crime at all stages of pregnancy and authorized the imposition of severe punishment. *See* Lord Ellenborough's Act, 43 Geo. 3, c. 58 (1803). One scholar has suggested that Parliament's decision "may partly have been attributable to the medical man's concern that fetal life should be protected by the law at all stages of gestation [15]."

The influence of Dr. Beck and others is evidenced by the adoption of some states of the concept of "vitality" which he promoted, "Indeed, no other doctrine appears to be consonant with reason or physiology, but that which admits the embryo to possess vitality from the very moment of conception [16]." The state of Texas used "vitality" in an 1859 statute:

Article 535: If any person shall, during parturition of the mother, destroy the *vitality* or life in a child, in a state of being born, and before actual birth, which child would otherwise have been born alive, he shall be punished, by confinement in the Penitentiary, for life, or any period not less than five years, at the discretion of the jury [17].

The state of Ohio enacted a similar statute in 1867:

[A]ny physician or other person who shall administer, or advise to be administered, to any woman pregnant with a *vitalized* embryo, or foetus, at any stage of utero-gestation, any medicine, drug, or substance whatever, or who shall use or employ… any instrument or other means with intent thereby to destroy such *vitalized* embryo, or foetus, unless the same shall have been necessary to preserve the life of the mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such *vitalized* embryo, or foetus, or mother in consequence thereof, be deemed guilty of a high misdemeanor [18].

In 1873, Nebraska follow suit:

Any physician or other person who shall administer, or advise to be administered, to any pregnant woman with a *vitalized* embryo, or foetus, at any stage of utero gestation, any medicine, drug, or substance whatever, or who shall use or employ, or devise to be used or employed, any instrument or other means with intent thereby to destroy such *vitalized* embryo, or foetus, unless the same shall have been necessary to preserve the life of the mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such *vitalized* embryo, or foetus, or mother, in consequence thereof, he imprisoned in the penitentiary not less than one nor more than ten years [19].

So too, the case law in some states likewise embraced the concept of "vitality." [20]. For example, in 1945, the Supreme Court of the Territory of Hawaii announced in *Territory of Hawaii v. Young*, 37 Hawaii 150:

[T]he period within which the crime may be committed ... [is] from the moment the womb is instinct with the embryo life and gestation has begun, until expulsion or delivery.... "[W]ith child". . . connotes a physical condition following conception and continuing until expulsion or delivery, irrespective of whether the fetus prior to expulsion has lost its *vitality* so that it could not mature into a living child [21].

PHYSICIANS REPLACED JURIS OF MATRONS

Physicians, in addition to playing a key role in the promulgation and implementation of the criminal abortion statutes of the nineteenth century, replaced juries of matrons [22], pursuant to a writ *de ventre inspiciendo [23]*. It seems the case of Bathsheba Spooner (daughter of the president of the Stamp Act Congress, Timothy Ruggles) played no small part in this change; the jury of twelve matrons and two men-midwives had returned a verdict that she was not quick with child, her subsequent plea to the Massachusetts Governor's Council was refused even after "The two men-midwives who were on the jury, and one of the matrons joined in a written statement with Dr. Green, the brother-in-law of Mrs. Spooner, that they now believed she was quick with child [24]." After her execution, Bathsheba's body was examined in accordance with her last request:

On the evening of the same day the body of the wretched woman was examined by surgeons, as she had requested, and a perfect male foetus of the growth of five months was taken from her. It was thus discovered, but too late, that a great and humane principle, to be found in the laws of all civilized nations, had been violated in her death. The effect of this discovery on the public mind can scarcely be adequately described [25].

Quite so. A Harvard Law Review article written over one hundred years later wrote about Bathsheba's case as if it had happened the month before:

It was hardly likely that the jury of matrons would be summoned again so long as Mrs. Spooner's case was fresh in mind. Moreover, the progress of the science of medicine has been so great during the past century that every year has seen it less expedient to resort to such clumsy means, when doctors can be had [26].

Although in at least one state the jury of matrons as an institution was already superseded by the medical profession by the late eighteenth century under its common law. This occurred in 1793 in the state of Virginia, as ordered by the governor in response to the condemned prisoner Angela Barnett's plea of pregnancy. She had been found guilty by a jury for the murder of one Peter Franklin and she was sentenced to death [27]. Her story might have ended there if Jacob Valentine had paid his debts on time; as Angela Barnett explained in her plea to the governor, Henry Lee III—American Revolutionary War officer (Henry "Light-Horse Harry" Lee) and father of Robert E. Lee:

His Excellency Henry Lee, Esquire, Governor, and the Honourable the Executive of Virginia:

The humble petition of Angelia Barnett Showeth that your unhappy petioner now under sentence of Death, is with child by a certain Jacob Valentine, who was a debtor arrested by the sheriff of Henrico, by virtue of an execution, and committed to the Jail of this city about the first of November last, 1792. [F]rom the connections your petitioner have had with him, she is fully confident of now bearing a live child, and therefore humbly & penitentially implores your generous mercy & Pardon, the more especially for the preservation of the Guiltless infant your unhappy petitioner now carries, which she humbly prays may not be murdered by her execution, but at least to grant her a respite until the child is born, and confiding in the mercy of your Excellencies, she continues to pray [28].

Angela Barnett's plea of pregnancy appears to not have been recorded in any other case books, but rather in a collection of Virginia state papers, VI Calendar of Virginia State Papers and Other Manuscripts: From August 11, 1792, to December 31, 1793 (S. McRae ed. 1886).

Angela's petition was granted, and she was examined to see if she was indeed "bearing a live child," a "Guiltless infant"—but she was not examined by a jury of matrons. Instead, she was examined by two doctors, Dr. James

Currie and Dr. J. K. Read; they produced a "Certificate as to Angelia Barnett" which read:

Pursuant to the Commands of his Excellency, the Governor, we, the subscribers, attended to the Goal of the city and examined (per vaginam) Angelia under sentence of Death. We found the uteras in that situation which it generally is, in a gravid State—an enlargement of the Belly—& on external application of the hand, we distinctly felt the motion of the Fetus. On these principles, we give it as our opinion that the afore said Anglia is in a state of pregnancy. Given under our hands this 16th May, 1793 [29].

So it is recorded that as early as 1793, in some instances, doctors conducted examinations pursuant to a writ *de ventre inspiciendo* in America rather than juries of matrons per the English common law. Although, the doctors did report "external application of the hand" resulted in feeling the motion of the fetus, they were clear that the examination that was expected of them, and upon which they based their opinion, was much more thorough than merely feeling the abdomen. Their examination was much more extensive than what would be contemplated by a simple affirmation of "'quickening' - the first recognizable movement of the fetus in utero," as Justice Blackmun described the term in *Roe [30]*. Indeed, they went onto to request the aid of another doctor known to the Governor's Council to explain the extensive procedure they performed to the Council, thereby assisting them in getting their bill paid for their services:

Doctor Read's compliments to Doct'r McClurgh; will be extremely obliged to him to bring forward his claim ag't the Council. He presumes, if the Executive were fully acquainted with the nature of the Examination, there would be little objection to the payment. He will be much obliged to D. McClurgh, if necessary, to explain the operation, which was per vaginam & fully disagreeable as a common operation in midwifery [31].

PHYSICIANS PROFESSIONAL RESPONSIBILITY UNDER ABORTION STATUTES

Physicians continued to play a key role in the application of abortion statutes to particular abortion prosecutions. One court held that the "good faith and honest belief of the doctor actually performing the operation" was the standard of intent to be used by a state in their burden of proof, where the issue was whether an abortion performed was unlawful and not in conformance with the accepted medical practice [32]. Another state supreme court held that where the diagnosis of a regular physician is that a patient is in imminent danger, that may not be negated by testimony of the patient herself to the contrary, "If the diagnosis of a regular physician discloses an internal condition of a patient which threatens his life, it may not be negated by the mere fact that the patient is unconscious of it, and feels well, and is apparently well [33]." So too, a physician might have the right to commit an abortion involving a dead fetus "upon the best judgment of that doctor and his judgment corresponds with the average judgment of the doctors in the community," but professional privilege of judgment which did not extend to the lay defendants who perform an abortion [34].

THE INALIENABLE RIGHT TO LIFE VERSUS PENUMBRAL PRIVACY

As was previously stated, the Supreme Court has previous held that the circumstances of a doctor-patient relationship may satisfy the "case or controversy" requirement of Article III of the Constitution and thereby allow physicians standing to assert the rights of another. Physicians have played a unique role in our legal history in advocating for the lives of children *en ventre sa mere* such that the laws of this nations had come to fully respect, prior to *Roe v. Wade*, their "The right to life and to *personal security* is not only sacred in the estimation of the common law, but it is inalienable." *Washington v. Glucksberg*, 521 U.S. 702, 714 (1997) (Rehnquist, C.J) (emphasis added) [35].

This may be contrasted with the Supreme Court's finding standing in the circumstances of the doctor-patient relationship, *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (Douglas, J.), "This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." The rationale given for the protection in this "penumbral" right is entirely problematic; in *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Douglas asserted (*id.* at 483, emphasis added):

In *NAACP v. Alabama*, 357 U.S. 449, 462, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a *peripheral* First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Ibid*. In other words, the First Amendment has a *penumbra* where privacy is protected from governmental intrusion.

Quite to the contrary, Justice Harlan in *NAACP v. Patterson*, 357 U.S. 449 (1958) did not hold the freedom of association to be a *peripheral* right of the First Amendment,

but rather used the term "association" as a synonym for the enumerated right of "assembly" in the First Amendment (*id*. at 462) (emphasis added):

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of *association* as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to *associate* and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of *assembly*, it said in *American Communications Assn. v. Douds, supra,* at 339 U. S. 402:

A requirement that adherents of particular religious faiths or political parties wear identifying armbands, for example, is obviously of this nature."

Moreover, the right of "privacy in one's association" was not a *peripheral* First Amendment *penumbra* either. Rather, it merited being included in the Due Process Clause of the Fourteenth Amendment as truly fundamental. Justice Harlan wrote how these concepts had a "close nexus," a "vital relationship" that was "indispensable," and were "inseparable" (*id*. at 460) (emphasis added):

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the *close nexus* between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an *inseparable* aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech….

It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the *vital relationship* between freedom to associate and privacy in one's associations….

Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in-group association may in many circumstances be *indispensable* to preservation of freedom of association, particularly where a group espouses dissident beliefs.

The terms Justice Harlan used, "close nexus," "vital relationship," "indispensable," and "inseparable," are not synonyms to Justice Douglas's term "peripheral," but rather antonyms. Justice Scalia hit the nail on the head when he disparaged substantive due process as an "oxymoron [36]." The term fundamental means "a leading or primary principle, rule, law, or article, which serves as the groundwork or basis; essential part" of something else [37]. Something may be said to be fundamental when it "is a foundation without which an entire system or complex whole would collapse [38]." Things that are peripheral, incidental, tangential, supplementary, ancillary, or superfluous are not by any reasonable definition equivalent to things that are fundamental, vital, indispensable, inseparable, essential, or necessary-except in the "through the looking glass" jurisprudence of substantive due process wherein antonyms become synonyms. Whereas, the right to life of children *en ventre sa mere* is truly fundamental, vital, indispensable, inseparable, essential, and necessary to the existence and assertion of all their other rights.

CONCLUSION

The historical advocacy by physicians for children *en ventre sa mere* has changed the course of American legal history. The doctor-patient relationship between physicians and children *en ventre sa mere* has been a fundamental factor in the advancement of legal protection for unborn children, and is inextricably linked to the advancements in their medical care over time. As such, the historical and present advocacy by physicians for said children, and the mothers who bear them, strongly supports a finding that physicians have Article III third-party standing in federal abortion controversies.

REFERENCES

1. Doe v. Bolton, Blackmun J. We conclude, however, that the physician-appellants, who are Georgia-licensed doctors consulted by pregnant women, also present a justiciable controversy and do have standing despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes. 1973.
2. Eisenstadt v. Baird, Brennan J. Appellant here argues that the absence of a professional or aiding-and-abetting relationship distinguishes this case from Griswold. Yet, as the Court's discussion of prior authority in Griswold, 381 U.S., at 481, indicates, the doctor-patient and accessory-principal relationships are not the only circumstances in which one person has been found to have standing to assert the rights of another. 1972.
3. Griswold v. Connecticut. Douglas J. "This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."). 1965.
4. Hammurabi § 206 (L. King trans. 1915). See Hammurabi §§ 215-223 (laws concerning the medical practice).
5. Dig. 11.8.2 (Marcellus, Digest 28) (S. Scott trans. 1932).

6. Johnson A, Coleman-Norton P, Bourne F. Ancient Roman Statutes: A Translation With Introduction, Commentary, Glossary, and Index, in 2 The Corpus of Roman Law (Corpus Juris Romani) (C. Pharr ed. 1961)). 2024.

7. Goodwin F. The XII Tables 39-40 (1886): "Posthumous children who, had they been born in the lifetime of the paterfamilias, would have been in his potestas, are sui heredes (G. III. 4); and, as we have seen, the extreme limit of gestation was fixed at ten month (T. IV. Fr. 4)."

8. Per Cicero, the unwritten laws of habit, of custom, formed most of the Praetors' Edicts (Cicero, De Inventione II.22), which in turn informs much of Justinian's Digest.

9. Dig. 38.8.1.9 (Ulpianus, On the Edict 46): If a woman should die while pregnant, and an operation should afterwards be performed to deliver the child, the latter is in such a position that it can obtain praetorian possession of the estate of its mother, as the nearest cognate. Since the passage of the Orphitian Decree of the Senate, the child can demand possession of the estate as heir at law, because it was in its mother's womb at the time of her death.

10. Dig. 38.17.1.5 (Ulpianus, On Sabinus 12): If, however, the son was born after a surgical operation had been performed upon his mother for that purpose, the better opinion is, that he will be entitled to her estate as heir at law. For he can demand praetorian possession, whether he was appointed heir, or his mother died intestate, as belonging to the class of cognates, and, still more, as one of the heirs at law. The proof of which is, that an unborn child is admitted to praetorian possession of the estate under every Section of the Edict. And, Title 9 of Book 37 of the Digest of Justinian, in its entirety, concerns the rights of the children en ventre sa mere. Dig. 37.9: "Concerning the placing of an unborn child in possession of an estate, and his curator." 2021.

11. Demain, 1 Brightly, Smith v. State, State v. Harris, Hans v. State. A Jury of Matrons, 32 Medical History 23, 29 n.28. 1988.

12. Richerand's Physiology. Am. ed.

13. Burton's Midwifery. 88.

14. Theodric Beck. Elements of Medical Jurisprudence 202 (1823) (footnotes omitted) (emphasis in the original). *See State v. Harris*, 136 P. 264 (1913): The arbitrary refusal of the common law to regard the fetus as alive in such cases until quick was based on no sound physiological principle. Beck makes it plain that the movement recognized by the mother, and which is supposed to prove that her unborn child is alive, is merely one evidence of life, whereas unless life had existed long before the disastrous consequences to the mother must have already been suffered. 1 Beck, Med. Jur. 464-467.

15. Dobbs v. Jackson. Women's Health Organization. 2022.

16. Theodric Beck. Elements of Medical Jurisprudence. 1823; 202.

17. Tex. Gen. Stat. Dig. ch. VII, art. 535 (Oldham & White 1859), as cited in Quay, *Justifiable Abortion—Medical and Legal Foundations*. 1961.

18. Steinberg v. Brown. 321 F.Supp. 741, 753 (N.D. Ohio 1970) (Green, J., dissenting) ("The 1834 statute was amended effective April 13, 1867, by the repeal of section two of the original Act and enactment of a substitute therefor, 64 v Stat. 135.").

19. Quay. Justifiable Abortion-Medical and Legal Foundations. 1961; 395: 492.

20. State v. Brown, 236 P.2d 59, 62, 171 Kan. 557, 560 (Kan. 1951) ("We said in *State v. Patterson*, 105 Kan. 9, 181 P. 609, that the term 'vitalized embryo' used in an information meant simply endowed with life."); *Lackey v. State*, 53 So.2d 25, 28, 211 Miss. 892, 900, (Miss. 1951) ("*Lee v. State*, 1921, 124 Miss. 398, 86 So. 856, 857, involved a conviction of manslaughter for a doctor's killing of a woman as a result of performing an operation on her for the purpose of an abortion of a vitalized embryo."). *See Commonwealth v. Brown*, 121 Mass. 69, 76 (1876) (jury instructions requested by the physician defendant, but not given)

21. Territory of Hawaii v. Young, 37 Hawaii. 1945; 150: 159-160.

22. Oldham J. Trial by Jury. 2006; 113-114.

23. Union Pacific R. Co. v. Botsford, 141 U.S. 250, 253 (1891) (Gray, J.) ("The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in order to guard against the taking of the life of an unborn child for the crime of the mother."). 1891.

24. Bathsheba Spooner, 2 Am. Crim. Trials 1. 48-50 (1778) (P. Chandler ed. 1844)

25. Id. at 53.

26. Note, 3 Harv. L. Rev. 45 (1889).

27. VI Calendar of Virginia State Papers and Other Manuscripts: From August 11, 1792, to December 31, 1793 (S. McRae ed. 1886) [hereinafter "Calendar of State Papers"], at 343.

28. Calendar of State Papers. BHO. 2025; 363-364.

29. Id. at 372.

30. Roe. 410 U.S. at 132

31. Calendar of State Papers. 372-373.

32. Wheeler. 315 Mass. 1944; 394: 396-397.

33. State v. Dunklebarger. 206 Iowa. 1928; 971: 979.

34. Nason. 252 Mass. 1925; 545: 551-552.

35. Ingraham v. Wright. 430 U.S. 1977; 651: 672-675.

36. U.S. v. Carlton. 512 U.S. 1994; 26: 39.

37. Webster's New Twentieth Century Dictionary 742 (2nd ed. 1983).

38. https://www.merriam-webster.com/dictionary/fundamental.