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The Ancients and the Medievals on Abortion: The Consensus the Court Ignored

ONE OF THE most garbled and error-laden parts of *Roe v. Wade* is that section dealing with the history surrounding the morality and legality of the practice of abortion in the Western world. It must not go unchallenged, because it was one of the supportive positions the Supreme Court used regarding the constitutionality of abortion laws in the United States. The Court's version of history is so defective that it serves no useful purpose and the accurate account, far from validating the position of the Court, offers a very convincing argument against it.

The Court's first error was in attempting to take refuge behind what has never been a decisive issue regarding the morality of abortion—the question concerning the beginning of human life. The Court assumed that it would have to establish prenatal beginnings to human life before it could justify legal protection for the fetus.[1] Since philosophers and theologians in the past were unable to agree as to when human life begins, the Court concluded that there was no legal duty to protect the fetus. In fact, it declared that giving such protection would be contrary to the Constitution. Practically speaking, although pretending to distance itself from the controversy, the Court operated on the presumption that the fetus did not become a human being until birth. So it opted for the negative side of what it considered an unresolved debate. We expect to show that there is no historical precedent for making abortion legislation hinge either on the presence of the human soul or on the beginning of human life.

Even in attempting to establish such a connection, the Court failed

to ask the proper question.[2] It spoke of "the difficult question of when life begins." Historically, this was never a difficult question. Even Aristotle admitted that life began at conception and said that life existed in the semen antecedent to conception. To Aristotle, however, life at conception came from a vegetative soul.[3] After conception this would eventually be replaced by an animal soul and the latter finally by a human soul. The difficult question became: when was this human soul infused, or when does the fetus become a human being? Aristotle thought this occurred when the fetus was formed—forty days after conception for the male fetus and ninety days for the female fetus. Aristotle also used the criterion of movement; that is, if the aborted fetus showed signs of movement it was considered human. But since this coincided with the time of formation, the time estimate was the same. At any rate, the difficult question was not when life began, but when human life begins.

Historically, the earliest thinking associated the beginnings of human life with breathing; thus, human life did not begin until birth— when the child first began to breathe.[4] Prior to birth the fetus was not an independent human being but part of the mother. Its life was similiar to that of other organs in the woman's body. From the Hebrew version of Exodus 21:22 it would seem that the early Jews adopted this more primitive view. To them the fetus became a fully human being only when it was born. Before that it was part of the mother. Later Jews seemed to adopt the Aristotelian viewpoint (Exodus 21:22, LXX version) associating the beginnings of human life with formation. Human life began when the fetus was formed and could be recognized as a human being. Although many Jews still maintained the earlier view, it was this concept which continued into the Christian era.

Whatever differences of opinion there may have been about the beginnings of human life in the pre-Christian Jewish tradition, they had nothing to do with basic judgments on the morality of abortion. One can argue indirectly that the early Jews considered abortion wrong because of the value they put on fertility and child-bearing and the horror with which they viewed barrenness. It can be argued more directly that abortion was considered wrong from the law itself. In the Book of the Covenant, causing an abortion (even accidentally) was penalized. What is clear in the legislation is that the question regarding the beginning of human life was not a relevant consideration. Even though the Jews held that human life did not begin until birth, they condemned abortion and penalized it. When later Jews accepted the Aristotelian view of the beginning of human life, they still condemned abortion.

With the acceptance of the Aristotelian opinion, time became a factor in grading the crime of abortion. If the abortion took place after

formation, it was considered homicide and the penalty was a capital sentence—"a life for a life." If the abortion took place before formation, it was still penalized, although the penalty was not as severe. Whatever the Jews thought about the beginning of human life, whenever abortion was induced they continued to condemn it as immoral. Nor did they hesitate to penalize abortion because it occurred prior to the beginning of human life. Clearly, we can find no justification in Jewish history to warrant the scruples of the Supreme Court when it says that legislation arose from doubt that the fetus is a human being.

There is no historical evidence that associating the beginning of human life with birth ever influenced early Christian thinking. Actually, a number of the early Fathers believed in immediate infusion of the human soul.[5] But the Aristotelian opinion, linking infusion of the human soul to formation, prevailed and continued to be generally accepted until the seventeenth century. However, the existing agreement on delayed animation did not affect the basic judgment about the morality of abortion prior to that time and it continued to be condemned—just as it was by Old Testament Jews.

Because it is no longer possible to speak of law in the same sense as used in antiquity, we must take note of one development that occurred in the Christian era. In the Book of the Covenant there are no neat distinctions between religion, morality, and law. Civil penalties were attached to violations of the Covenant and were looked upon as God's law. Jews, like their neighbors in the Mideast, used the *lex talionis* (the law of retaliation) as their norm for punishing crime. However, the early church, unlike its Jewish forerunners, never functioned as a theocracy and, consequently, never resorted to the kind of penalty civil society uses against wrongdoing.

On the moral level, it is quite clear that the church considered all abortion wrong. In the Didache, a late first century or early second century catechism, there is an explicit condemnation of abortion and infanticide: "Thou shalt not kill the child before birth by abortion or after birth by infanticide."[6] This quote is from a section which was taken from a catechism used by the Jews in proselytizing. It is quite evident that the Jewish condemnation of abortion continued into the Christian era, becoming part of the Christian tradition.[7] So, in this regard, there is an obvious continuity between the Jewish and Christian traditions.

Although the church seldom had recourse to civil penalties, it did impose spiritual penances for wrongdoing or sin; consequently, the mind of the church is better expressed in her penitential legislation. Legislative history is long and involved; but the church constantly condemned abortion as a serious sin. The penances attached to it were

initially quite severe and involved exclusion from the church for as long as ten years.[8] Sometimes these penances were imposed for abortion without qualification. Increasingly, lesser penances, although still quite severe, were imposed for abortion before formation. More severe penances were imposed for abortion after formation because it was considered homicide.[9]

Initially, reconciliation was granted only after penances were completed. But as penitential discipline developed in the church, although penances were still attached to sins, absolution or reconciliation was given immediately.[10] The faithful were no longer excluded from communion with the church until their penance was completed. At this time the practice of attaching an "excommunication" to certain serious transgressions began.[11] This special penance was usually attached only to abortion of the formed fetus because this was considered homicide. But abortion at any time was still judged to be a serious sin and was subject to ordinary penitential discipline. Thus, in the Christian era, abortion has always been considered a serious sin even though it may have been induced prior to formation, that is, prior to the time when it was generally thought the human soul was infused. The basic judgment of the morality of abortion never hinged on the presence or absence of the human soul. There is not a single precedent in the entire Christian era for the kind of paralysis regarding protection of the fetus that the Supreme Court judged to be inherent in the inability to establish the beginning of human life.

That the time question was never really relevant to the basic morality of abortion is quite clear from the fact that the Roman Catholic Church, and probably other Christian churches, has never defined the beginning of human life. There is no truth in the Court's statement that the Aristotelian theory of mediate animation continued to be "official Roman Catholic dogma" until the middle of the nineteenth century and that immediate animation is now the "official belief of the Catholic Church."[12] The church has never declared such a dogma or belief. Her consistent condemnation of abortion has always been independent of the question of the beginning of human life. The only conclusion one can come to on the level of church teaching is that the human soul is infused sometime prior to birth. Such teaching would not be sufficiently precise for legal purposes.[13] Although the church did not teach the Aristotelian opinion as doctrine, her penal legislation simply followed the accepted thinking of the time.

The basic argument against abortion has always been that the conceptus has a human destiny and this is what makes it sacred. Whatever one may consider its early status to be, it has this destiny,

right from the beginning, to be a human being. As Tertullian said: "He is a man who will be a man."[14] Without hesitation, based on this kind of argument, the church condemned abortion. Over the centuries, the argument against abortion has never been based on an assumption of immediate infusion of the human soul.

The Court claims that a large segment of the Protestant community held that life did not begin before birth.[15] I know of no evidence to support this claim. I can understand how the Jews might consider it part of their tradition, but the Protestants have no such tradition. They come out of a tradition which for centuries followed the Aristotelian opinion. Moreover, the more primitive view was based largely on the supposition that the fetus was part of the mother until birth. With our current knowledge of fetology, there is absolutely no basis for holding such a position. And the recent achievement of *in vitro* fertilization makes it an obvious anachronism. As an authority on genetics recently testified, the fetus is no more part of the mother than an astronaut is part of the space machine in which he is carried.[16]

For some curious reason the Court never explicitly asks the basic question about the morality of abortion in the Judeo-Christian tradition. Yet, the answer to this question is the key to the whole legal tradition in the Western world. The answer is that in the Judeo-Christian tradition abortion has been consistently condemned as immoral.

Without in any way confusing morality with law, it can be said that this is the fundamental reason behind the laws enacted against it. This does not imply that everything that is immoral should be a matter for penal legislation. But what is immoral may also be against the welfare of the community. Thus, homicide has always been penalized and abortion, even when not classified as homicide, has always been considered analogous to it in the sense that it is harmful to the community as well as the fetus. This is precisely why abortion legislation has been common in the Western world.

Roe v. Wade considers it apparent that prior to the mid-nineteenth century abortion was viewed with less disfavor than afterward. It interprets this to mean that, at that time, a woman enjoyed "a substantially broader right to terminate a pregnancy." Becoming more specific, it says that "with respect to the early stage of pregnancy, and very possibly without such limitation, the opportunity (to choose abortion) was present in this country well into the nineteenth century."[17]

It is not easy to handle this kind of scatter-shot claim but this much can be said. In the whole Judeo-Christian tradition abortion was considered immoral and looked upon with disfavor. Far from being a

substantial right in the eighteenth century, there is no evidence that any such right to abortion existed. The fact that abortion was considered immoral would preclude any such right. Even if the Court were speaking of some kind of "civil right," it is doubtful that any jurist would allow one to conclude its existence automatically from the absence of penal legislation. Certainly, there is no explicit mention of any such right.

Implications, well into the nineteenth century, from the absence of legislation against early abortion can be grossly misleading. The Court actually makes the claim that abortion laws "are not of ancient or even of common law origin."[18] The truth is that there has been abortion legislation in the Western world since the end of the second century. It goes back to an early third century application of the Cornelian law *(de sicariis)* to abortion by the Roman jurist, Julius Paulus.[19] According to Paulus, if anyone gave to another an abortifacient *(poculum abortionis),* he would be sentenced to work in the mines or be exiled and lose part of his property. If the victim died, a capital sentence would be imposed. A decree by Severus and Antoninus also attached a penalty for a self-induced abortion; any woman inducing an abortion upon herself would be exiled.[20]

There is nothing in these laws about early or late abortion. Thus, one must conclude that the penalty was incurred whenever the abortion took place. It must be admitted that until recent times there was no certain way of detecting early pregnancies. There were indeed "signs" that people have always used, but none of them were unambiguous.[21] One must also acknowledge that it was difficult to detect and, therefore to prove, early abortion. But inability to prosecute early abortions because of evidentiary problems should not be confused with toleration or acceptance.

One may want to argue that the concern of the Cornelian law when applied to abortion was for the mother and that the concern about an abortion caused by the woman herself was for the rights of the husband.[22] Certainly, there was concern about the mother in a case where she was deceived by another. But the law clearly applied as well to a case in which the mother knowingly took the drug. But even if the concern in this legislation was primarily for the mother, and not the father, it must have arisen because the fetus was considered something of value and its loss a tragedy in their lives. In reality, the concern for the fetus became more explicit when later abortions began to be classified as homicide. Even though early abortions may not have been classified as homicide, there is reason to believe that the concern for the fetus in these instances was serious.

What is important from our viewpoint is that these laws came into

existence at a time when Roman law still associated human life with birth and when the fetus was considered part of the mother before birth.[23] The basis for such legislation may have been a well-known legal axiom: *conceptus pro iam nato habetur.*[24] According to this axiom, whenever some benefit to the fetus was at stake it was to be treated like a person already born. Whatever the reason may have been, the Romans were in no way inhibited in legislating against abortion by the fact that the fetus was not considered a human being until birth. Again, the reluctance of the Supreme Court to acknowledge abortion legislation is historically unwarranted.

We are uncertain when the Aristotelian opinion, which associated the beginning of human life with formation, was introduced into Roman law. Accursio, a thirteenth century Italian jurist, in his gloss on Paulus seems to have been the first claiming that the distinction between the formed and unformed fetus applied to the law.[25] As noted above the distinction appeared much earlier in the penitential discipline of the church. The practical consequence of applying the distinction to the law was that capital punishment was imposed for abortion of the formed fetus. Since then, the distinction became part of Roman law and was the basis for imposing capital punishment for abortion performed after formation. Accursio made no comment about abortion before formation, so it was presumed that the traditional punishment of forced labor, fine, or exile was imposed for such abortions. Also, we are quite certain that the forty/ninety-day estimate was used for the time of formation and, therefore, of animation with a human soul.

This distinction was continually applied into the seventeenth century and capital punishment remained the punishment for abortion of a formed fetus. An exception to the law did develop where abortion was permissible to save the life of the mother; however, for other abortions of a formed fetus, capital punishment was imposed.

Our own law is based on English common law and not Roman law. So the status of abortion in English common law may be more pertinent to our tradition. If we look at English common law, we find a close tie to the general Western tradition, which is undoubtedly due to the fact that both stem from the Judeo-Christian culture: More specifically, the bond is between Sir Henry Bracton and the Spanish jurist, Raymond of Penaforte.[26] Bracton's suggested penalties for abortion parallel quite closely Raymond's response in his *De Penitentia.*[27] Actually, the English would find nothing new in Bracton's assimilation of Penaforte's distinction between the formed and unformed fetus because this distinction was already seen as early as the seventh century English penitentials found in Canon law.[28] What

may have been new was the application of the distinction to civil law. As we have already seen, it was at about this time that Accursio first applied it to Roman law. From the end of the second century the punishment in the Roman law was the same for all abortion. While severe, it did not go as far as capital punishment. With the application of the distinction to Roman law, however, abortion of the formed fetus was classified as homicide and merited capital punishment. In applying the distinction to English law, Bracton may have been the first to do for English law what Accursio did for Roman law.

But it should be pointed out that Bracton was preoccupied with classifying the abortion of a formed and animated fetus as homicide. He said nothing explicitly about abortion of the unformed fetus. There is no justification for the conclusion that no penalty was imposed on this kind of abortion. If the Roman (civil) law was used as a model, there is reason for believing that the contrary is true.

It is clear that during Bracton's era English common law classified abortion of the animated fetus as homicide. Presumably, this was understood in the traditional sense, namely, forty/ninety days after conception. This classification is confirmed by the anonymous judge whose commentary, published under the name *Fleta,* included sterilizing potions as well as abortifacients.[29]

At the end of the sixteenth century, English jurists began questioning the capital sentence imposed on abortion. Eventually, this sentence disappeared from civil law. Sir Edward Coke argued that abortion would not constitute murder unless the child was born alive and then died as the result of the abortion.[30] Blackstone, the great eighteenth century jurist, followed Coke and said that abortion is not murder unless the fetus is delivered alive and then dies of the injuries inflicted.[31] Coke calls abortion a great "misprision" and says that "so horrible an offense should not go unpunished." Blackstone calls it a "very heinous misdemeanor." The expression seems contradictory if one understands "misdemeanor" in the modern sense of the term. To these eminent jurists, however, this was not some minor offense. It bordered on, but was not, a capital crime. And the penalty, though less than "life for life," might be quite severe, e.g., loss of a member, confiscation of property, or a life in prison.[32]

In spite of the historical testimony of Coke and Blackstone, the United States Supreme Court makes the claim that prior to the nineteenth century abortion of the quickened fetus went unpunished. The claim is based on a study by Cyril C. Means, Jr., who charges that Coke "invented" the crime of aborting a quickened fetus and that Blackstone uncritically followed him.[33] It is not within the scope of this article to offer a full critique of Means's hasty assertions, but his

conclusions are based on very meager evidence. Consequently, one must turn to a more plausible interpretation that does less violence to historical truth. Abortion of the animated (quickened) fetus was classified as homicide centuries before Blackstone, Coke, or Bracton, and the classification was based on the judgment that the human soul was infused at the time of formation. Neither Coke nor Blackstone "invented" this. If they "invented" anything, it was the requirement that the fetus be alive after being aborted and then die from the injuries. This was not the basis for the original classification of homicide. Even for Coke and Blackstone this may have been more for evidentiary than for classification purposes. Practically speaking, what they did was to reduce the penalty for causing the abortion of a fetus that was formed and therefore animated (quickened), but dead at birth. The problem with this position is that the death before or at birth may have been attributable to the severity of the violence. In that event the requirement would seem to put a premium on greater violence.

More important from the viewpoint of our study is the fact that the position taken by Coke and Blackstone, apart from the above requirement, is consistent with the entire history of the subject. Means's inaccurate position that abortion of the "quickened" fetus went unpunished prior to the nineteenth century requires a complete rewriting of actual history.

Another development found in Blackstone was the association of "quickening" with the time when the fetus began to stir in the womb.[34] The term initially seems to have been the translation of the Latin term *fetus animatus,* referring to the fetus in whom the human soul was already infused. As we have seen, this was initially associated with the formation of the fetus and took place forty/ninety days after conception. "Quickening," in the sense in which Blackstone used it, occurred much later, not until the fourteenth to sixteenth week; so it had nothing to do with either the common estimate of the infusion time of the human soul or the time when the fetus was thought to become a human being. But it did replace the common time estimate in English law, as well as in early statutory law in this country. The understanding of "quickening" in Blackstone seemed to serve evidentiary purposes rather than the original purpose of the term, which was to indicate the beginning of human life.

Although Coke and Blackstone discuss the abortion issue, they say nothing explicitly about abortion before "quickening." Their concern seemed to be chiefly with the relation of abortion to murder and, hence, to capital punishment. Coming to any conclusion about abortion before quickening from what they said would be risky. *Roe v.*

Wade acquired this risk in drawing the conclusion from their silence that there was no penal law against abortion prior to "quickening."

Whatever may have been the development regarding the notion of quickening in English common law, the whole distinction would soon give way to a more sophisticated understanding of conception and fetal development.[35] This new thinking, both philosophical and scientific in origin, began with the discovery of ovulation and, eventually, of the ovum and fertilization, and led to immediate animation as a conclusion. In other words, both philosophers and physicians began to hold that human life was present virtually from the time of conception. It was easy to argue delayed animation when one thought that semen gradually turned into blood and then into flesh and bone and eventually into a human form. But with the discovery of fertilization, and particularly with the discovery of the genetic makeup of the fertilized ovum, it became quite clear that something new was present from the very time of fertilization. Delayed animation made less and less sense, and both philosophers and physicians began to argue in favor of very early, if not immediate, animation with a human soul. The distinction between formed and unformed fetuses gradually began to lose any meaning and eventually disappeared from both civil and ecclesiastical penal law. Today it is safe to say that the arguments for immediate animation are better than those for animation at any later date, although we should never expect the physical sciences to find the human soul. In summary, we can accurately assert the following:

1. Early Jews condemned abortion as immoral even though they believed that the fetus did not become a human being until birth. They also imposed legal penalties on abortion.
2. Later Jews imposed capital punishment on abortion after formation (homicide) at a time when the Aristotelian opinion about the beginnings of human life was not accepted by all Jews.
3. Even though the controversy about the beginnings of human life was never definitively settled, abortion continued to be generally condemned as immoral throughout the Christian era.
4. Throughout the Christian era, even after the Aristotelian opinion was generally accepted, penances continued to be imposed for abortions before formation.
5. Though the church, in the Christian era, never defined the beginning of human life, abortion after forty or ninety days was treated as homicide in the penitential discipline of the church.
6. Despite the fact that the fetus was not considered a human being until birth, Roman civil law from the end of the second century penalized abortion.

7. In the later Roman law, abortion after formation was punished as homicide even though the Aristotelian opinion on which this was based was still not definitive.

In full view of all the available evidence, one must conclude that the position taken by the Supreme Court—that one cannot legislate against abortion unless and until one can show that the fetus is a human being—has no historical precedent.

Notes

1. The Court admitted that the state might have "interests" in protecting potential life in the fetus, but these would be overridden by the woman's right to privacy. The latter would be "compelling" reasons for giving some protection to the fetus after viability, although later decisions seemed to void such reasons. And, even if they had not, the health of the mother would easily become a general overriding reason.

2. Roe v. Wade, 410 U.S. 113, 159 (1973).

3. Aristotle, "On the Generation of Animals," Book 2, 3, in W.D. Ross, ed., *The Works of Aristotle* (Oxford: Clarendon Press, 1912), vol. 5, 736. See also, Aristotle, "On the History of Animals," Book 3, 7, in Ross, op. cit., vol. 4, 583 (1910). *Roe,* 110 U.S. at 134, states that there was agreement that the fetus prior to formation was part of the mother. This was not true of Aristotle and his followers.

4. This thinking prevailed in Stoic philosophy, and was the basis for Roman law, but with the modification mentioned in text accompanying notes 22-24, infra.

5. See John R. Connery, *Abortion: The Development of the Roman Catholic Perspective* (Chicago: Loyola Univ. Press, 1977), 52.

6. J.A. Kleist, trans., Didache 18, in Johannes Quasten and Joseph C. Plumpe, *Ancient Christian Writers* (Westminster, Md.: The Newman Press, 1948). See also Epistle of Barnabas, in Kleist, op. cit., 64.

7. J.P. Audet, *La Didachè, Instructions des Apôtres* (Paris: 1958), 188-89.

8. The first legislation against abortion is found in a council held at Elvira (c. A.D. 305) in Spain (Canon 63, Mansi, ed., *Amplissima Collectio Conciliorum,* vol. 1, 16). Because of its severity (a lifetime penance), it did not survive. Shortly after, the Council of Ancyra (A.D. 314) imposed a ten-year penance for abortion (Canon 21, Mansi, op. cit., vol. 2, 514). This became the common canonical penance, although a seven-year penance was also established.

9. The distinction, although found in the early Fathers, seems to have appeared first in penitential practice in the penitential books which came from Ireland and England, but it remained part of penitential discipline for many centuries.

10. Absolution began to be imparted immediately after confession at the end of the first millenium or the beginning of the second millennium.

11. Special "excommunication" was introduced into church discipline in the twelfth or thirteenth century.

12. *Roe,* 410 U.S. at 160-161.

13. The general conclusion that in the mind of the church the soul is infused before birth can be inferred from the condemnation by Innocent XI (1679) of the proposition that it is probable that the fetus is without a rational soul as long as it remains in the uterus and that it begins to have one only when it is born. Adolph Schoenmetzer, S.J., Henry Denziger, *Enchiridion Synbolorum* (New York: Herder, 1963), 461.

14. Termllian, *Apology,* trans. T.R. Glover, Loeb Classical Reprint (London: 1966), 49.

15. *Roe*, 410 U.S. at 160.

16. Testimony of Dr. Jerome Lejeune, Professor of Fundamental Genetics, Medical College of Paris, France, April 23, 1981. *Hearing before The Subcomm. on Separation of Powers of the Sen. Comm. on the Judiciary on S. 158,* 97th Cong., 1st Sess. (Committee Print 1982), pp. 9-10.

17. 410 U.S. at 140-41.

18. 410 U.S. at 129.

19. S.P. Scott, ed. *Corpus Iuris Civilis,* 17 vols. (New York: AMS Press Inc., 1973), vol. 1, 326, *Opinions of Julius Paulus,* Book V, Title 23, para. 8; *Corpus Iuris Civilis,* op. cit., Digests or Pandects of Justinian, Book 48, Title 19, para. 38, sec. 5.

20. *Corpus Iuris Civilis,* op. cit., vol. 10, 328, Digests or Pandects, Book 47, Title 11, para. 4. It is referred to as the law *Divus.* In the Digest, *Corpus Iuris Civilis,* op. cit., vol. 11, 61, Book 48, Title 8, para.8, no mention is made of the husband.

21. Paolo Zacchia, an early seventeenth century physician, said that it is most difficult to detect a pregnancy during the first four months, but easier afterwards. Paolo Zacchia, *Questionum Medico-legalium,* Book 1, Title 1, Part 1 (Lyons: 1701).

22. *Roe*, 410 U.S. at 130, makes the claim that the concern of these laws was for the rights of the husband. This is true of the original Divus decree, but it is certainly not the whole truth. Cyril Means states that the U.S. abortion laws of the nineteenth century were aimed at the protection of the mother rather than the fetus. Means, *The Phoenix of Abortional Freedom: Is A Penumbral Or Ninth Amendment Right About To Rise From The Nineteenth Century Legislative Ashes of Fourteenth Century Common Law Liberty?* 17 N. Y. L. Forum 335, 382-391 (1971). Again, this is not the whole truth. Historically, abortion laws from Exodus to the present, while concerned with the welfare of the mother, punished abortion even when no harm was done to the mother.

23. *Corpus Iuris Civilis,* op. cit., vol. 6, 43-53, Digest, Book 25, Title 4, para. 1, sec. 1.

24. *Corpus Iuris Civilis,* op. cit., vol. 2, 228, Digest, Book 1, Title 5, Para. 7; Book 26

25. Accursio, Glossa in Divus, in *Corpus Iuris Civilis,* Digest, Book 47, Title 11, para. 4. ("exilium"). See Accursio, *Digestum novum Pandectarum* (Lyons: 1557), p. 949.

26. Raymond of Penaforte, *Summa de penitentia et matrimonio* 2, 1, 6 (Rome: 1603).

27. 2 George Woodbine, ed., Bracton, *De legibus et consuetudinibus Angliae,* trans. Samuel E. Thorne (Cambridge, Mass.: Harvard Univ. Press, 1968), 341.

28. The distinction will be found in the seventh century penitentials of Theodore of Canterbury. H. Wasserschleben, *Die Bussordnungen der abendlandischen Kirche* (Graz: 1958), 155.

29. 2 H.G. Richardson and G.O. Sayles, eds., *Fleta* (London: Selden Society, 1955), 63-61.

30. Edward Coke, *Third Part of the Institutes of the Laws of England,* chap. 7.

31. 4 William Blackstone, *Commentaries on the Laws of England* (Chicago: Univ. of Chicago Press, 1979), p. 198. For the meaning of *misprision,* see 4 Blackstone, op. cit., p. 119 ff.

32. Coke, op. cit., p. 36, 39-40.

33. Means, op. cit., 346.

34. 1 Blackstone, op. cit., p. 125-126.

35. Delayed animation began to be questioned seriously in the early seventeenth century. *See* Connery, op. cit., 168 ff. For a full discussion of the born-alive rule and the quickening doctrine under the common law, *see* Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms,* 21 Val. U.L. Rev. No. 3 (to be published, 1987), and Horan, Forsythe, and Grant, *Two Ships Passing in the Night: An Interpretavist Review of the White-Stevens Colloquy on* Roe v. Wade, 6 St. L. Pub. L. rev. 43, 91-106 (1987).