



1976

Fetal Experimentation: Rights of the Father and Questions of Personhood

John P. Wilson

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>

 Part of the [Constitutional Law Commons](#), [Medical Jurisprudence Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

John P. Wilson, *Fetal Experimentation: Rights of the Father and Questions of Personhood*, 22 Vill. L. Rev. 403 (1976).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol22/iss2/12>

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

FETAL EXPERIMENTATION: RIGHTS OF THE FATHER AND QUESTIONS OF PERSONHOOD

JOHN P. WILSON†

I. INTRODUCTION

Fetal experimentation is surely one of the thorniest problem areas in the law. Like the insanity defense, about which so much has been written and argued, it contains a mine of issues at an intersecting point of law, medicine, and morals. Two of the most difficult of these issues will be discussed in this article: the requirement of paternal consent for fetal experimentation, and the human status of the nonviable fetus, *i.e.*, the fetus *ex utero* which is not viable.

The first of these issues is procedural in nature, the second, substantive. The degree of protection afforded the nonviable fetus depends upon the resolution of these issues. Each will be discussed in the context of four "documents." The first of these is the Supreme Court's decision in *Roe v. Wade*,¹ its landmark abortion opinion. The second and third, in chronological order, are the report (Report) of the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research² (Commission) and the regulations³ of the Department of Health, Education, and Welfare (HEW), which embody most, although significantly not all, of the recommendations in the Commission's report dealing with the two issues which are the subject of this article. The fourth "document" is the case of *Planned Parenthood v. Danforth*,⁴ a recent decision of the Supreme Court which amplified its holding in *Roe* with respect to the status of the fetus and paternal rights. Following a brief descriptive treatment of each of these "documents," I shall offer my own observations and analysis.

II. THE FOUR "DOCUMENTS"

A. *The Roe Decision*

While *Roe* says very little of direct relevance to the inquiry here, it is the foundation upon which the discussion must be built. Its essential

† Associate Dean and Director of the Legal Studies Institute, Boston University School of Law. A.B., Princeton University, 1955; LL.B., Harvard University, 1962.

1. 410 U.S. 113 (1973).

2. NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, REPORT AND RECOMMENDATIONS: RESEARCH ON THE FETUS (DHEW Pub. No. (OS) 76-127, 1975), also printed in 40 Fed. Reg. 33,530 (1975) (partially codified in 45 C.F.R. §§ 46.101-301 (1976)) [hereinafter cited as COMMISSION'S REPORT]. For the reader's convenience, chapters VIII and IX of the *Commission's Report* are reprinted in this symposium at 300-24, and unless otherwise indicated, all citations to the *Commission's Report* refer to these pages.

3. 45 C.F.R. §§ 46.201-301 (1976).

4. 96 S. Ct. 2831 (1976).

holding is now well known to both lawyers and laymen alike: The act of obtaining an abortion is encompassed within the right of privacy protected by the fourteenth amendment; as such, a woman's right to abortion is fundamental and may only be subject to state regulations which are based upon a compelling state interest. With respect to abortion, the state has two compelling interests: the first, a concern for maternal health, which justifies regulating abortion procedures during the last two trimesters of pregnancy, and the second, a concern for protecting the potentiality of life, which justifies prohibiting abortion entirely during the third trimester, except where the purpose is to preserve maternal life or health.⁵

The third trimester, the Court noted, is of particular significance, because it is at this point that a fetus may be viable, *i.e.*, "potentially able to live outside the mother's womb, albeit with artificial aid."⁶ The Court recognized that the age of viability has shifted backward from birth with advances in medical technology. According to the Court, "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."⁷

To arrive at its decision, the Court held, as it had to, that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."⁸ Thus, a state may choose not to restrict abortions even after viability, and a fetus has no right to object upon constitutional grounds, even though harm might occur. No doubt because the opinion focused upon the right of a mother to obtain an abortion, almost no notice was taken of the status of a fetus following induced or spontaneous birth. The majority opinion noted that "the law has been reluctant to endorse any theory that life . . . begins before live birth."⁹ The term "live birth" was not defined, and the Court did not indicate whether the concept was tied in any way to viability.

Similarly, the Court did not consider the rights of other parties when an abortion is performed. It centered its attention upon the competing interests of the state and the woman (with her attending physician) who seeks to terminate a pregnancy. The issues of parental and spousal consent were mentioned only in a footnote and specifically not decided.¹⁰

B. Report of the Commission

The Commission was created by an act of Congress¹¹ which simultaneously imposed a moratorium on federally supported or conducted fetal

5. 410 U.S. at 154-55, 162-64.

6. *Id.* at 160.

7. *Id.*

8. *Id.* at 158.

9. *Id.* at 161.

10. *Id.* at 165 n.67.

11. National Research Act, Pub. L. No. 93-348, §§ 201-205, 88 Stat. 342 (1974).

research pending the Commission's report.¹² Its tasks were broadly defined,¹³ but in view of the moratorium, the Commission was given a limited period of time after its establishment in which to consider the manifold issues respecting fetal experimentation and make recommendations.¹⁴ The urgency of the task was also suggested by the very reason which prompted the moratorium: an accelerating amount of fetal research and mounting concern on the part of many — a concern heightened by the Court's decision in *Roe* — for the rights of the fetus.¹⁵

The Report addressed the critical issues associated with fetal research. It tried to balance the interests of the fetus and the interests of the scientific community in this area of promising and valuable research; as a result, it is a document not calculated to please strong proponents of either set of interests. The Commission approved research while limiting its extent. As a safeguard the Commission required the mother's informed consent for both therapeutic and nontherapeutic research on the fetus *in utero* and *ex utero*.¹⁶ But the question of whether the father's permission was necessary was cast in negative rather than affirmative terms. That is to say, the father was not required to give explicit informed consent, but he was given a veto power through a right to object to the research.¹⁷

Possibly this distinction is based upon the Commission's accurate apprehension that in some cases fathers will be unknown or unavailable. In such situations, to require their informed consent would obviously curtail research. It does not account, however, for fathers who are present and concerned about the well-being of their fetal children. While the father's power may be as great as the mother's in that both he and the mother can prohibit experimentation, there is a subtle distinction of status. The mother must be fully informed, but the father need not be. Hers is a positive role, his a negative one.

The Commission evidenced great solicitude for the nonviable fetus *ex utero*. However, it did not go so far as to label this fetus a child, using instead the more neutral term "subject,"¹⁸ thereby obscuring a precise definition of its human status. The Commission stated that while questions of risk are less relevant for a nonviable fetus because it cannot be injured for life, "considerations of respect for the dignity of the fetus continue to be of paramount importance, and require that the fetus be treated with the respect due to dying subjects."¹⁹ Having said this, the Commission then countenanced nontherapeutic research upon this fetus if

12. *Id.* § 213.

13. *Id.* § 202(b).

14. *Id.* § 203(d) (four months from the date the Commission took office).

15. *See, e.g.,* Scarf, *The Fetus as a Guinea Pig*, N.Y. Times, Oct. 19, 1975, § 6 (Magazine).

16. COMMISSION'S REPORT, *supra* note 2, at 311-12.

17. *Id.*

18. *See, e.g., id.* at 306-07.

19. *Id.* at 306.

important biomedical knowledge could be gained thereby,²⁰ thus placing the nonviable fetus *ex utero* in a unique class separate from other human, nonconsenting, dying patients upon whom experimentation would be impermissible. The only limitation was a prohibition against altering the duration of fetal life by artificial means for research purposes²¹ — a somewhat inconsistent concession once nontherapeutic research is permitted.

C. *Regulations of the Department of Health,
Education and Welfare*

The Commission submitted the Report to the Secretary of HEW and in due course HEW promulgated regulations (Regulations), which for the most part echoed the Commission's recommendations.²² At the same time the Regulations were issued, the Secretary lifted the moratorium on federally supported or conducted fetal research.²³

With regard to paternal consent, the Regulations made explicit what had been implicit but ambiguous in the recommendations of the Commission. The informed consent of both the mother and father is required for all forms of therapeutic and nontherapeutic research on the fetus, whether *in utero* or *ex utero*.²⁴ However, the father's informed consent is not required when the fetus is *in utero* and the primary reason for research is to meet the health needs of the mother,²⁵ or when "(1) [the father's] identity or whereabouts cannot reasonably be ascertained, (2) he is not reasonably available, or (3) the pregnancy resulted from rape."²⁶

As for the nonviable fetus *ex utero*, the Regulations essentially adopted the position of the Commission,²⁷ and like the Commission, the Regulations did so without explaining the underlying basis of that position.²⁸ It is not clear, therefore, whether HEW views the nonviable fetus as a human person in the full legal sense of the word, but if it does, then this fetus is a human person with fewer rights and privileges than any other. The critical dividing line is viability, and until it is determined that a fetus *ex utero* is nonviable, subjecting the fetus to added risk from experimentation is impermissible.²⁹ But once nonviability is ascertained, the nonviable fetus appears to be vulnerable to nontherapeutic research of essentially unspecified risk if the research is directed toward developing

20. *Id.* at 311-12.

21. *Id.*

22. See 45 C.F.R. §§ 46.201-301 (1976).

23. See *id.*

24. *Id.* §§ 46.207-209.

25. *Id.* § 46.207.

26. *Id.* § 46.207-209. It might be noted that, unlike sections 46.207 and 46.209, section 46.208 states that a father's *consent*, instead of *informed consent*, need not be obtained under certain circumstances. Compare *id.* § 46.208 with *id.* §§ 46.207 and 46.209.

27. Compare *id.* §§ 46.206 and 46.209 with Commission's Report, *supra* note 2, at 312 (Recommendation 6).

28. See text accompanying notes 15-18 *supra*.

29. 45 C.F.R. § 46.209(a) (1976).

important biomedical knowledge which cannot be obtained by other means.³⁰ As recommended in the Report, the Regulations proscribe experimentation which will alter the duration of fetal life, but, contrary to the Report, a specific exception is allowed "where the purpose of the activity is to develop new methods for enabling fetuses to survive to the point of viability."³¹

D. Planned Parenthood v. Danforth³²

On July 1, 1976, in the *Danforth* case, the Supreme Court delivered a second major decision on the subject of abortion. The case involved a challenge to several provisions of a Missouri statute³³ which carefully regulated certain aspects of abortion in the interstices of the *Roe* opinion. Of specific relevance here is one of these statutory provisions which required the written consent of the spouse of a woman seeking an abortion during the first twelve weeks of pregnancy "unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother."³⁴ Another challenged provision, section 6(1), read as follows:

No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter. . . . Further, such physician or other person shall be liable in an action for damages. . . .³⁵

The Court held both provisions to be unconstitutional.³⁶ On the issue of paternal consent, in reversing the three-judge district court convened below,³⁷ the Court stated: "[S]ince the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision [to abort], the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same

30. See *id.* § 46.209(b). For the discussion of the Commission regarding the different interpretations of minimal risk when a fetus is to be aborted, see COMMISSION'S REPORT, *supra* note 2, at 304-06.

31. 45 C.F.R. § 46.209(b)(1) (1976). But see note 94 *infra*.

32. 96 S. Ct. 2831 (1976).

33. *Id.* at 2833-34. For the text of the statute, see *id.* at 2848-50, quoting Mo. ANN. STAT. §§ 188.010-.085 (Vernon Supp. 1977).

34. 96 S. Ct. at 2848, quoting Mo. ANN. STAT. § 188.020(3) (Vernon Supp. 1977).

35. 96 S. Ct. at 2848, quoting Mo. ANN. STAT. § 188.035(1) (Vernon Supp. 1977).

36. 96 S. Ct. at 2842, 2848.

37. *Planned Parenthood v. Danforth*, 392 F. Supp. 1362 (E.D. Mo. 1975), *aff'd in part and rev'd in part and remanded*, 96 S. Ct. 2831 (1976).

period."³⁸ While recognizing "the importance of the marital relationship" and "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying,"³⁹ the Court stated that when the husband and wife disagree, it is an "obvious fact" that the view of only one can prevail,⁴⁰ and "[s]ince it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."⁴¹

Picking up this last theme, Mr. Justice Stewart, in a concurring opinion joined by Mr. Justice Powell, averred that the paternal consent question was "a rather more difficult problem than the Court acknowledges."⁴² Citing *Stanley v. Illinois*⁴³ and *Skinner v. Oklahoma*,⁴⁴ he pointed out that previous decisions of the Court "have recognized that a man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom."⁴⁵ The issue for Justice Stewart, then, was one of choice between competing, and presumably fundamental, rights. Faced with that choice, however, he agreed with the majority that the balance weighed in favor of the mother.⁴⁶

Mr. Justice White, joined by the Chief Justice and Mr. Justice Rehnquist, sharpened the issue further in a separate opinion dissenting and concurring in part.⁴⁷ Directly challenging the principal thrust of the majority opinion, which spoke in terms of a delegation of state authority to the husband, Justice White asserted that "the husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of the wife."⁴⁸ For Justice White, it did not follow that, because the state's interest was outweighed by the mother's right of privacy, the state could not protect the husband's interest in a matter of such fundamental importance to him.⁴⁹

In far more caustic terms, Justice White also disagreed with the majority in its treatment of section 6(1).⁵⁰ The majority had concluded that the statute's command to physicians to preserve the life and health of a fetus was unconstitutional, because "[i]t does not specify that such care need be taken only after the stage of viability has been reached."⁵¹ Mr. Justice White read the statute differently, construing it to apply "only

38. 96 S. Ct. at 2841.

39. *Id.*

40. *Id.* at 2842.

41. *Id.*

42. 96 S. Ct. at 2850 (Stewart, J., concurring).

43. 405 U.S. 645 (1972).

44. 316 U.S. 535 (1942).

45. 96 S. Ct. at 2850 (Stewart, J., concurring).

46. *Id.* at 2851.

47. *Id.* (White, J., concurring in part and dissenting in part).

48. *Id.* at 2852 (footnote omitted).

49. *Id.*

50. *Id.* at 2855-56.

51. *Id.* at 2847.

in the gray area after the fetus *might* be viable."⁵² On this basis he concluded that "[s]ince the State has a compelling interest, sufficient to outweigh the mother's desire to kill the fetus, when the 'fetus . . . has the capability of meaningful life outside the mother's womb' the statute is constitutional."⁵³ However, for Justice White as well as for the majority, abortion apparently implies terminating fetal life at the behest of the mother, and in terms of requiring physicians to preserve life, the critical dividing line appears to be viability.

III. PATERNAL CONSENT

The Court's holding in *Danforth* on the issue of paternal consent may make sense for purposes of abortion, but it does nothing but muddy the waters when it is applied in the context of fetal experimentation. For the fetus *in utero*, are we to conclude that the mother's predominant interest arises from the fact that the fetus resides within her, or is this interest limited solely to her choice between retaining the fetus or expelling it from her womb? *Roe* and *Danforth*, of course, may be read narrowly to apply only to abortion. But abortion, at least for the previable fetus (and the overwhelming number of abortions involve fetuses in the first and second trimester), involves a killing. If death may be decreed by the mother alone, does it make sense to restrict her from inflicting the usually lesser degrees of harm associated with fetal experimentation?

The answer, I believe, is in the affirmative. The right to inflict a great loss does not necessarily include a corresponding right to impose lesser deprivations. For example, the imposition of capital punishment by a state confers no right upon that state to inflict cruel and unusual punishment short of death. Perhaps more to the point, the right to abort a fetus and terminate its existence should not include a right to experiment heedlessly with a potential human being. The fetus' continuing potentiality places it in a different status for purposes of protection. This continuing potentiality should likewise change the equation in terms of paternal consent. A prospective father has a substantial interest in his unborn child, an interest ranging from a growing emotional investment to a state-mandated duty of maintenance and support following the child's birth. There is no logical reason why a father's wish to protect his maturing offspring from experimentation should be outweighed by the mother. His decision in this respect does not encroach upon her right to terminate the pregnancy, and in cases where research on the fetus *in utero* is not coupled with therapeutic research on the mother, she cannot claim a predominant health interest.

These reasons, applicable in all instances where a fetus *in utero* is the sole subject of either therapeutic or nontherapeutic research, are even more persuasive once the fetus has been delivered. At that point the

52. *Id.* at 2855 (emphasis in original).

53. *Id.*, citing *Roe v. Wade*, 410 U.S. 113 (1973).

mother can claim neither the inviolability of her body nor maternal health as justifications for an interest superior to the father's. It is noteworthy that a majority of the justices in *Danforth* recognized fatherhood as a fundamental right,⁵⁴ although a different majority, for differing reasons, held that the balance weighs in favor of the mother for purposes of abortion.⁵⁵ *Stanley* was cited in support of the proposition that significant rights attach to paternity.⁵⁶ That case, of limited relevance here because informed consent was not an issue, involved an Illinois statute which presumptively declared that an unwed father was unfit to be the guardian of his children following their mother's death.⁵⁷ Married parents and unwed mothers were not similarly treated. Finding that the statute violated Stanley's constitutional right to due process and equal protection, the Court stated: "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. . . ."⁵⁸

It is no doubt obvious, in view of the arguments and points raised above, that I regard the Regulations on paternal consent to be superior to the recommendations of the Commission. A father's informed consent, not merely his veto, should be necessary to conduct fetal research. As I certainly would not exclude the mother, it follows that the informed consent of *both* parents should be required, unless one is unavoidably absent. This conclusion may differ from case law, which seemingly sanctions consent by only one parent.⁵⁹ But consent of both parents is a desirable safeguard because the consent relates to experimentation and not proven therapy, and because fetal research is conducted upon a class of subjects which is peculiarly vulnerable.

If both paternal and maternal consent should be required, however, it does not follow that their consent alone should be sufficient for some forms of research contemplated by the Regulations. Propositions drawn from the kidney and bone marrow transplantation cases are useful here for purposes of comparison. In these cases, following consent by both parents and judicial review of their decision, a vital organ or tissue was transplanted from a healthy donor sibling to another sibling who was seriously

54. 96 S. Ct. at 2850, 2852 (Stewart, Powell, White, Rehnquist, JJ., and Burger, C.J.). Mr. Justice White stated that: "A father's interest in having a child — perhaps his only child — may be unmatched by any other interest in his life." *Id.* at 2852. Mr. Justice Stewart refers to "a man's right to father children and enjoy the association of his offspring" as a "constitutionally protected freedom" and a "right" that competes with a woman's constitutionally protected decision to terminate her pregnancy. *Id.* at 2850-51.

55. Mr. Justice Blackmun delivered the opinion of the Court. *Id.* at 2834. On the issue of spousal consent he was joined by Justices Brennan, Stewart, Marshall, Powell and Stevens. *Id.* at 2851, 2856.

56. *Id.* at 2850 (Stewart, J., concurring); *id.* at 2852 (White, J., concurring in part and dissenting in part).

57. 405 U.S. 645, 650 (1972).

58. *Id.* at 651.

59. *See, e.g., Bonner v. Moran*, 126 F.2d 121 (D.C. Cir. 1941).

ill and dying.⁶⁰ No question was raised by the courts about the right of parents to consent for the donee child, and it is clear that parents may place a child at great risk if, in a situation of necessity, the child may receive a substantial benefit. Courts have also permitted parents to subject their donor child to nontherapeutic procedures if the benefits, even though not to that child, outweigh the risks.⁶¹ Parental authority is treated with deference, and judges are reluctant to countermand a carefully weighed decision by parents, even in a situation where a conflict of interest is present because the donor and donee are their own children.

The Regulations and the recommendations of the Commission are not in conflict with these cases insofar as therapeutic research is concerned: risk must be proportionate to anticipated benefit, *i.e.*, it must be the minimum necessary to meet health needs,⁶² but here, as with their minor children, parents presumably have broad discretion. For nontherapeutic research on fetuses *in utero*, the Regulations explicitly require that risk be minimal, and this restriction applies whether or not a fetus is scheduled for abortion.⁶³

In the case of nonviable fetuses *ex utero*, it is not clear that these same protections apply. Research on such fetuses, by definition, is nontherapeutic (except possibly when it is directed toward the development of an artificial placenta). Few restrictions are contained in the section of the Regulations dealing directly with these fetuses,⁶⁴ and a limitation of risk appears to have been intentionally omitted, although the general limitations section requires risk to be minimal in all cases except where an activity is to meet health needs.⁶⁵ However, minimal risk is difficult to define, as the Commission recognized,⁶⁶ and it is even more difficult to discern how risk can be calculated for a being whose potential for continued existence is gone and who "cannot be 'harmed' in the sense of 'injured for life'."⁶⁷

60. See *Hart v. Brown*, 29 Conn. Sup. 368, 289 A.2d 386 (1972); *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969); *Nathan v. Farinelli*, No. 74-87 Eq. (Mass. July 3, 1974), reprinted in 1974 INS. L.J. 411; *Foster v. Harrison*, No. 68-674 Eq. (Mass. Nov. 20, 1957); *Huskey v. Harrison*, No. 68-666 Eq. (Mass. Aug. 30, 1957); *Masden v. Harrison*, No. 68-651 Eq. (Mass. June 12, 1957). See also Baron, Botsford & Cole, *Live Organ and Tissue Transplants from Minor Donors in Massachusetts*, 55 B.U. L. REV. 159 (1975); Curran, *A Problem of Consent: Kidney Transplantation in Minors*, 34 N.Y.U. L. REV. 891 (1959).

61. See, *e.g.*, cases cited in note 60 *supra*. It is worth noting that at least one court has refused to allow such a procedure where the transplantation was not an "absolute, immediate necessity" to preserve the life of the intended donee. See *In re Richardson*, 284 So. 2d 185, 187 (La. App.), cert. denied, 284 So. 2d 338 (La. 1973).

62. 45 C.F.R. § 46.206(a)(2) (1976); see COMMISSION'S REPORT, *supra* note 2, at 320-21 (Statement of Commissioner Karen Lebacqz).

63. 45 C.F.R. §§ 46.206(a)(4), 46.208(a)(2) (1976).

64. See *id.* § 46.209(b).

65. *Id.* § 46.206(a)(2). Pursuant to certain guidelines, the Secretary may modify or waive specific requirements when "the sum of the benefit to the subject and the importance of the knowledge to be gained" warrant it. *Id.* § 46.211.

66. See COMMISSION'S REPORT, *supra* note 2, at 304-05.

67. See *id.* at 306.

In contrast to the judicial decisions described above, no life-saving benefit to another sibling will be involved in this research; indeed, the beneficiary, if any, will be unknown, and no review or approval by a court will be required. These safeguards may not be necessary, however, in less exigent circumstances, *e.g.*, in a situation of minimum risk — no benefit, which constitutes a relatively small departure from presently accepted situations in which parental consent may be exercised. Thus, if experimentation on nonviable fetuses is truly of a minor nature and is invasive to a minimal extent, it seems reasonable to conclude that courts would not overrule parental consent, especially if important biomedical knowledge might be obtained.

Nevertheless, I would require the additional safeguard of approval by an independent board or committee in advance of any such research. The recommendations of the Commission and the Regulations do not explicitly impose this additional safeguard.⁶⁸ Presumably this omission is based upon the conclusion that in most cases parental consent will be sufficient and less bureaucratically cumbersome. Latitude may be given to parents because the classes of fetuses under consideration are not regarded as full human persons. As the following discussion will point out, however, that conclusion is questionable as it pertains to the nonviable fetus *ex utero*.⁶⁹

IV. THE NONVIALE FETUS *Ex Utero*

While *Roe* permitted abortion, it did not mandate any particular technique, nor did it consider the status of a fetus which might survive the procedure. It was not unreasonable, therefore, for legislatures to infer that the Court's emphasis was upon the right of a woman to expel a

68. See *id.* at 311-14; 40 Fed. Reg. 33,526-527, 33,529, 33,546-48 (1975). The committee structure is there to be used, however. Institutional Review Boards oversee the consent process and may intervene if unanticipated risks arise. 45 C.F.R. § 42.205 (a)(2)(iii) (1976). Ethical Advisory Boards may establish, with the approval of the Secretary, classes of applications which must be submitted to them. *Id.* § 46.204(d). The Regulations state in part:

Where the Board so establishes a class of applications or proposals which must be submitted, no application or proposal within the class may be funded by the Department or any component thereof until the application or proposal has been reviewed by the Board and the Board has rendered advice as to its acceptability from an ethical standpoint.

Id.

69. As for the fetus *in utero*, its potential personhood should preclude its assignment to a class which is accorded less protection. Moreover, an extra layer of decisional authority would be a particularly useful safeguard in the case of fetuses scheduled for abortion, since the presumption of a high degree of parental concern for the fetus in these instances is a debatable proposition. See testimony of Hans Tiefel before the Subcommittee on Human Experimentation and Clinical Investigation, Massachusetts Legislature (April 24, 1975) (on file at the *Villanova Law Review*).

fetus from her womb and that although this action would assuredly lead to the death of a fetus prior to viability, there was not a *necessary* relationship between the right to an abortion and killing the fetus. As a consequence of this reading of *Roe*, a state could require those procedures best calculated to preserve fetal life and health and could cast a mantle of protection about any fetus born alive following, for example, a hysterotomy procedure, no matter what stage of gestation that fetus might be in.

Section 6(1) of the Missouri statute on abortion,⁷⁰ declared unconstitutional in *Danforth*,⁷¹ seems to have adopted this interpretation of *Roe*. Its language is confusing, however. The first sentence⁷² could apply to fetuses *in utero* or fetuses *ex utero*, or both, but the majority in *Danforth* apparently read it to include only the former. This is a plausible interpretation, particularly in view of the fact that another section of the statute bans saline amniocentesis as a method of abortion.⁷³ The Attorney General of Missouri, however, argued that the only intent of section 6(1) was to require physicians to support a live baby which resulted from an abortion,⁷⁴ an interpretation consistent with the second sentence, which refers to a "child."⁷⁵ The Court declined to sever the second sentence or obtain a construction of it in the state courts and stated that "a physician's or other person's criminal failure to protect a liveborn infant surely will be subject to prosecution in Missouri under the State's criminal statutes."⁷⁶

It is difficult to know what to make of the Court's analysis. Surely the Court did not mean to exclude viable aborted neonates from statutory protection, although its refusal to sever the provisions of the statute implies this result. The status of the nonviable fetus *ex utero* is also unclear. Is it a "liveborn infant" in the Court's view, even if its lifespan is limited? Or, as a fetus, is it included *sub silentio* under the constitutionally defective first sentence of the statute⁷⁷ and, therefore, bereft of the protection provided by that sentence? Did the Court even consider the nonviable fetus *ex utero*?

The opinion in *Danforth* might have answered these important questions, but it did not. The Court could have defined the nonviable fetus

70. MO. ANN. STAT. § 188.035(1) (Vernon Supp. 1977).

71. 96 S. Ct. at 2847-48.

72. The first sentence of section 6(1) states:

No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted.

MO. ANN. STAT. § 188.035(1) (Vernon Supp. 1977).

73. *Id.* § 188.050.

74. *See* 96 S. Ct. at 2847.

75. The second sentence of section 6(1) states: "Any physician or person assisting in the abortion who shall fail to take such measures to encourage or sustain the life of the *child*, and the death of the *child* results, shall be deemed guilty of manslaughter. . ." (emphasis added). MO. ANN. STAT. § 188.035(1) (Vernon Supp. 1977).

76. 96 S. Ct. at 2848.

77. *See* note 72 *supra*.

ex utero as a child because of its live birth and upheld its constitutional rights; or it could have clearly excluded this class of fetuses from personhood; or the Court could have granted the nonviable fetus *ex utero* special protection, like that of the viable fetus *in utero*, despite its lack of personhood.

None of this was done, but perhaps we ask too much. The status of the nonviable fetus is impossible to define by resort to any standard other than *a priori* belief. Fetal development lies on a continuum, and on the basis of physical indices there is no point prior to viability where one can confidently say that a being on one side of a line is a human person, while a being on the other side is not.

The attempts at definition in past judicial opinions are of little or no assistance in resolving the issue. Usually they state in conclusory terms that if an infant is "born alive," it possesses the rights of a human being.⁷⁸ In homicide cases, an infant is considered "born alive" if it has been completely expelled from the mother's body and has a separate and independent existence, the latter term being proven by a showing of independent circulation and/or respiration.⁷⁹

Certainly some nonviable fetuses can meet these tests, just as there is no question that in later stages of gestation these fetuses can live for brief periods of time after expulsion from the womb. But the judicial opinions, in both tort⁸⁰ and homicide⁸¹ cases, usually deal with babies born at full term or struggle with the concept of viability, a line which appears to have implicit significance in defining personhood or potential personhood. This struggle is not without practical merit: a nonviable fetus has no conscious awareness, no apprehension of its existence or of harm, and most likely does not apprehend pain.⁸²

Nevertheless, in the face of uncertainty, my inclination is to choose a more inclusive definition which regards a nonviable fetus with appropriate indices of life as a human person.⁸³ Those who lack these indices may

78. *E.g.*, *Logue v. State*, 198 Ga. 672, 32 S.E.2d 397 (1974); *People v. Ryan*, 9 Ill. 2d 267, 138 N.E.2d 516 (1956).

79. *E.g.*, *Montgomery v. State*, 202 Ga. 678, 44 S.E.2d 242 (1947); *Jackson v. Commonwealth*, 265 Ky. 295, 96 S.W.2d 1014 (1936). There appears to be disagreement as to whether the umbilical cord must be severed in order to show separate and independent existence. Compare *Morgan v. State*, 148 Tenn. 417, 256 S.W. 433 (1923), with *Jackson v. Commonwealth*, 265 Ky. 295, 96 S.W.2d 1014 (1936).

80. *E.g.*, *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974); *Chrisafogeorgis v. Brandenburg*, 55 Ill. 368, 304 N.E.2d 88 (1973); *Leccese v. McDonough*, 361 Mass. 64, 279 N.E.2d 339 (1972). See also W. PROSSER, *LAW OF TORTS* 336-37 (4th ed. 1971).

81. *E.g.*, *Singleton v. State*, 33 Ala. App. 536, 35 So. 2d 375 (1948); *People v. Chavez*, 77 Cal. App. 2d 621, 176 P.2d 92 (1947). See also Annot., 65 A.L.R.3d 413, §§ 4-5 (1975); 40 Am. Jur. 2d *Homicide* § 9, at 300-01 (1968).

82. Interview with Dr. David Nathan, Professor of Pediatrics, Harvard Medical School, Children's Hospital Medical Center, Boston, Mass., in Boston (Feb. 13, 1975); see Scarf, *supra* note 15, at 93-94.

83. For a contrary proposition, see 45 C.F.R. § 46.203(f) (1976).

be presumed dead. This posture ensures that efforts to push back the point of viability will continue, and it clearly assumes the constitutional validity of statutes which require that "living" fetuses *ex utero* be given the benefit of every advance in perinatal care.

A conclusion that the nonviable fetus *ex utero* is a person, however, invites questions about the recommendations of the Commission and the subsequent Regulations. Both permit nontherapeutic research upon this fetus,⁸⁴ although such research would be impermissible on other classes of incompetent, dying subjects.⁸⁵ Yet the Commission went so far as to say that while the nonviable fetus "may not be 'harmed' in the sense of 'injured for life,' issues of violation of integrity are nonetheless central."⁸⁶ How can the integrity of the nonviable fetus be preserved, if it is the subject of nontherapeutic experimentation?

One might say, although perhaps not confidently, that this kind of research, involving "minimal" risk, in fact adds a measure of dignity to an otherwise short and apparently useless existence.⁸⁷ And, while it is outside the scope of this brief article, one might perhaps argue that such research should, with appropriate safeguards, be permitted on other uncomprehending or incompetent subjects. More to the point, there are valid reasons for not objecting to this type of research on a nonviable fetus, despite its inclusion in the human family. Although there is some doubt, it is generally thought that the physiological development of the nonviable fetus precludes the transmission of pain impulses within the central nervous system.⁸⁸ Upon this ground alone it can be distinguished from mature but comatose subjects, and this fact militates against the danger of brutalizing those who permit or perform the research. It seems unlikely that allowing nontherapeutic experimentation on nonviable fetuses would provide a logical justification for research upon persons distinguished by race, religion, degree of intelligence or status who have in the past been subjected involuntarily to experimentation.⁸⁹

Nontherapeutic research of minimal risk is one thing, but research which artificially maintains vital functions in order "to develop new methods for enabling fetuses to survive to the point of viability"⁹⁰ may be

84. See 45 C.F.R. § 46.209 (1976); COMMISSION'S REPORT, *supra* note 2, at ____.

85. See generally *Hyman v. Jewish Chronic Disease Hosp.*, 15 N.Y.2d 317, 206 N.E.2d 338 (1965).

86. COMMISSION'S REPORT, *supra* note 2, at 306.

87. See *id.* at 322-23 (statement of Commissioner Karen Lebacqz).

88. Interview with Dr. David Nathan, Professor of Pediatrics, Harvard Medical School, Children's Hospital Medical Center, Boston, Mass., in Boston (Feb. 13, 1975); see Scarf, *supra* note 15, at 93-94.

89. See Bok, *Ethical Problems of Abortion*, 2 HASTINGS CENTER STUD. 33 (1974); Martin, *Ethical Standards for Fetal Experimentation*, 43 FORDHAM L. REV. 547 (1974).

90. 45 C.F.R. § 46.209(b)(1) (1976).

another. Although permitted by the Regulations,⁹¹ past (albeit highly infrequent) forms of this research, such as submersion of fetuses in hyperoxygenated saline solution in an attempt to provide oxygen through the skin,⁹² offend many members of society and certainly appear to compromise the dignity and integrity of the nonviable fetus as a dying subject. As it seems obvious that most fetuses subjected to this type of experimentation will gain, at most, a slightly longer existence in which they struggle for life, it is difficult not to characterize the research as nontherapeutic and the risk as incalculable. Even though the standard of minimal risk for a nonviable fetus is difficult to comprehend and may be no more than a cautionary safeguard, it seems safe to assume that unfettered use of nonviable fetuses to develop an artificial placenta violates any reasonable interpretation of this standard.

The general limitation on risk in the Regulations, however, contains an exception "where the purpose of the activity is to meet the health needs of the particular fetus."⁹³ According to this language, it can be argued that any effort to preserve or prolong life, even if doomed to failure, is essentially therapeutic. Doctors often engage in heroic efforts to maintain life for short periods of time, and as long as caring parents weigh the alternatives and consent, any amount of indignity or discomfort would appear to be justifiable to achieve this goal.

There is no easy test by which to resolve this problem, and the Regulations have not done so; but it is submitted that the answer turns on whether there is any, even remote, chance of prolonged existence. If there is not, the nonviable fetus is simply a research tool, and even if the fetus *ex utero* is distinguishable from more mature subjects, this type of potentially degrading, clearly nontherapeutic research is too offensive to community sensibilities to be permitted. On the other hand, if, after prior animal testing, there is some possibility of success, I would characterize the experiment as therapeutic and permit it to proceed.⁹⁴ Of course the safeguard of parental consent would be necessary, and approval in each case by an Ethical Advisory Board (after review of the experimental design) would be desirable.⁹⁵ Nontherapeutic elements could not then be introduced into the research design, and some fetuses, presently nonviable, might live to join the other members of the human family.

91. *Id.*

92. See COMMISSION'S REPORT, 40 Fed. Reg. 33,534 (1975).

93. 45 C.F.R. § 46.206(a) (2) (1976).

94. A recently proposed amendment to section 46.209 of the Regulations seems to recognize (though it may not solve) these problems by permitting activities directed toward the nonviable fetus *ex utero* where "[t]he purpose of the activity is to enhance the possibility of survival of the particular fetus to the point of viability." See 42 Fed. Reg. 2792-93 (1977) (proposed amendment to 45 C.F.R. § 46.209).

95. See note 68 and accompanying text *supra*.

V. CONCLUSION

Fetus experimentation involves a tension between the demands of medical research to improve fetal (and maternal) prospects for life and health and the rights of fetal research subjects. The laudable objectives of the research community do not eliminate that tension. I have attempted to be sensitive to those objectives and to the good which may accrue from research efforts, but my biases are toward the fetal research subject. Where practically possible in light of recent Supreme Court decisions, I would define the fetus as a human person. I would require paternal consent for research, not just to protect the interests of fatherhood, but as an additional safeguard for a developing human being. As for nonviable fetuses, I would require the additional consent of an Ethical Advisory Board to provide community oversight and a community response whenever they are subjects of highly invasive research efforts.