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Recent Decisions

RECENT DECISIONS

Wrongful Death of a Stillborn Infant—*Lawence v. Craven Tire Co.*

At common law when a harm was inflicted which gave rise to a cause of action in tort, the action either died with the injured party, or if pending, abated with his death.[1] Today by statute, the personal representative of the decedent is given a cause of action for wrongful death.[2]

A recent expansion of this concept has been to allow recovery for injuries negligently inflicted upon an unborn child, resulting in still-

[1] *See, e.g.*, Aetna Life Ins. Co. v. Moses, 287 U.S. 530 (1933); Partee v. St. Louis & S.F.R.R., 204 F. 970 (8th Cir. 1913); Sonner v. Cordano, 228 F. Supp. 435 (D. Nev. 1963); Ivey v. Wiggins, 276 Ala. 106, 159 So. 2d 618 (1964); Anderson v. Anderson, 211 Tenn. 566, 366 S.W.2d 755 (1963); Burns v. Brickle, 106 Ga. App. 150, 126 S.E.2d 633 (1962); Beck v. Groe, 245 Minn. 28, 70 N.W.2d 886 (1955); Minkin v. Minkin, 336 Pa. 49, 7 A.2d 461 (1939); Storrs v. Mech, 166 Md. 124, 170 A. 743 (1934); Porter v. Sorell, 280 Mass. 457, 182 N.E. 837 (1932); Braun v. Riel, 40 S.W.2d 621 (Mo. 1931); Bortle v. Osborne, 155 Wash. 585, 285 P. 425 (1930); Dow v. Legg, 120 Neb. 271, 231 N.W. 747 (1930); Krause v. Rarity, 210 Cal. 644, 293 P. 62 (1930); Debus v. Cook, 198 Ind. 675, 154 N.E. 484 (1926); Goodyear v. Davis, 114 Kan. 557, 220 P. 282 (1923); Smith v. Odd Fellows Bldg. Ass'n., 46 Nev. 48, 205 P. 796 (1922); Nolan v. Moore, 81 Fla. 594, 88 So. 601 (1920); Sharrow v. Inland Lines, Ltd., 214 N.Y. 101, 108 N.E. 217 (1915); Christilly v. Warner, 87 Conn. 461, 88 A. 711 (1913); Dougherty v. American McKenna Process Co., 255 Ill. 369, 99 N.E. 619 (1912); Stevenson v. W. M. Ritter Lumber Co., 108 Va. 575, 62 S.E. 351 (1908); Baker v. Bolton, 1 Camp. 493, 170 Eng.Rep. 1033 (1808).

[2] *See, e.g.*, Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913); Sacks v. Creasy, 211 F. Supp. 859 (E.D. Pa. 1962); United States Fidelity & Guar. Co. v. Reed Constr. Corp., 149 So. 2d 578 (Fla. 1963); Gray v. Goodson, 61 Wash. 2d 319, 378 P.2d 413 (1963); Buie v. Hester, 147 So. 2d 733 (La. App. 1962); Fussner v. Andert, 261 Minn. 347, 113 N.W.2d 355 (1961); Lindley v. Sink, 218 Ind. 1, 30 N.E.2d 456 (1940); State *ex rel.* Dunnigan v. Cobourn, 171 Md. 23, 187 A. 881 (1936); Porter v. Sorell, 280 Mass. 457, 182 N.E. 837 (1932); Ghilain v. Couture, 84 N.H. 48, 146 A. 395 (1929); Brookshire v. Burkhart, 141 Okla. 1, 283 P. 571 (1929); White v. Atchinson, T. & S.F.R.R., 125 Kan. 537, 265 P. 73 (1928); Regan v. Davis, 290 Pa. 167, 138 A. 751 (1927); Swope v. Keystone Coal & Coke Co., 78 W. Va. 517, 89 S.E. 284 (1916); McFarland v. Oregon Elec. R.R., 70 Ore. 27, 138 P. 458 (1914); Buel v. United R.R., 248 Mo. 126, 154 S.W. 71 (1913); Bond v. United R.R.'s of San Francisco, 159 Cal. 270, 113 P. 366 (1911).

The wrongful death statutes in the United States are modeled after Lord Campbell's Act. The Act provides that whenever the death of any person is caused by the wrongful act, neglect, or default of another, in such a manner as would have entitled the party injured to have sued had death not ensued, an action may be maintained in the name of the executor or administrator for the benefit of certain relatives. 9 & 10 Vict., Ch. 93 (1846).

birth.[3] Most of these decisions permitting recovery have applied to

[3] *See* Panagopoulous v. Martin, 295 F. Supp. 220 (S.D.W. Va. 1969); White v. Yup, ... Nev. ..., 458 P.2d 617 (1969); Orange v. State Farm Mut. Auto. Ins. Co., 443 S.W.2d 650 (Ky. 1969); Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); Leal v. C. C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); State *ex rel.* Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Worgan v. Greggo & Ferrara, Inc., 50 Del. (11 Terry) 258, 128 A.2d 557 (1956); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. App. 1951). *See generally* Pan-American Casualty Co. v. Reed, 240 F.2d 336 (5th Cir.), *cert. denied*, 355 U.S. 819 (1957).

A controlling influence in the trend to permit recovery has been the dissenting opinion of Mr. Justice Boggs in Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638, 641 (1900). Justice Boggs concluded:

> [W]henever a child in utero is so far advanced in prenatal age as that, should parturition by natural or artificial means occur at such age where such child could and would live separately from the mother, and grow into the ordinary activities of life, and is afterward born and becomes a living human being, such child has a right of action for any injuries wantonly or negligently inflicted upon his or her person at such age of viability, though then in the womb of the mother. *Id.* at 642.

The first American jurisdiction to extend a right of action to the personal representative of a stillborn child was Minnesota. In its decision the court held that the special administrator of the estate of the unborn infant, which died before birth from injuries inflicted upon it, had a cause of action on behalf of the decedent's next of kin under the wrongful death statute. Viability of the child was a requisite for recovery. Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).

Some courts have taken the view that an unborn viable child capable of existing independently from its mother, when injuries are wrongfully inflicted upon it, may after birth, maintain an action for such injuries. *See* Bonbrest v. Kotz, 65 F. Supp. 138 (D.C. Cir. 1946); Seattle-First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 367 P.2d 835 (1962); Shousha v. Matthews Drivurself Serv., Inc., 210 Tenn. 384, 358 S.W.2d 471 (1962); Sinkler v. Kneale, 401 Pa. 267, 164 A.2d 93 (1960); La Blue v. Specker, 358 Mich. 558, 100 N.W.2d 445 (1960); Keyes v. Construction Serv., Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958); Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 93 S.E.2d 727 (1956); Mallison v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1955); Prates v. Sears, Roebuck & Co., 19 Conn. Supp. 487, 118 A.2d 633 (1955); Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949); Scott v. McPheters, 33 Cal. App. 2d 629, 92 P.2d 678, *aff'd per curiam*, 93 P.2d 562 (1939); Cooper v. Blanck, 39 So. 2d 352 (La. App. 1923). The key factor in these decisions is "life". The child must at some point be alive outside the mother's womb, regardless of how long it is. In a recent Massachusetts decision it was held that a wrongful death action would lie on behalf of a child that was injured during gestation and lived only two and one-half hours. Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967).

viable fetuses.[4] However, the Virginia Supreme Court of Appeals, in *Lawrence v. Craven Tire Co.*,[5] recently decided that no cause of action exists in such an instance.

In *Lawrence*, the plaintiff's wife, pregnant with a viable child, was a passenger in a vehicle involved in a collision due to the negligence of one of the defendants. The prenatal child received injuries which impeded its development, thereby resulting in stillbirth. The court, in denying recovery, held that a viable fetus is not considered a "person" within the wrongful death statute,[6] and that no common law action can be maintained by a child *en ventre sa mere*.

There have been several reasons for disallowing a right of action for the wrongful death of a stillborn child. The reason most frequently adhered to is based on economic considerations[7] in that no pecuniary

[4] *See* Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964); Wendt v. Lillo, 182 F. Supp. 56 (N.D. Iowa 1960); White v. Yup, — Nev. —, 458 P.2d 617 (1969); Orange v. State Farm Mut. Auto. Ins. Co., 443 S.W.2d 650 (Ky. 1969); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); Hatala v. Markiewicz. 26 Conn. Supp. 358, 224 A.2d 406 (1966); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); State *ex. rel.* Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); Stidan v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Worgan v. Greggo & Ferrara, Inc., 50 Del. (11 Terry) 258, 128 A.2d 557 (1956); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Annot., 15 A.L.R.3d 1004 (1967).

A viable fetus is one that has reached such a stage of development that it can live outside the uterus. J. SCHMIDT, ATTORNEY'S DICTIONARY OF MEDICINE 870 (1968); T. MONTAGO, PRENATAL INFLUENCES 398 (1962); B. MALOY, MEDICAL DICTIONARY FOR LAWYERS 706 (1960).

To extend the right of recovery to include prenatal injuries incurred prior to viability would create a difficult problem of proof of causation and results would be based chiefly on speculation. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 356 (3d ed. 1964); Reed, *Prenatal Injuries, Development of the Right of Recovery*, 10 DEFENSE L.J. 29, 46 (1961); Del Tufo, *Recovery for Prenatal Torts*, 15 RUTGERS L. REV. 61,65 (1960); 18 VAND. L. REV. 847, 853 (1965).

[5] 210 Va. 138, 169 S.E.2d 440 (1969).

[6] VA. CODE ANN. § 8-633 (Cum. Supp. 1968).

[7] *See* Goodrich v. Moore, 8 Mich. App. 725, 155 N.W.2d 247 (1967); Endresz v. Friedberg, 52 Misc. 2d 693, 276 N.Y.S.2d 469 (Sup. Ct.), *aff'd mem.*, 28 App. Div. 1085, 285 N.Y.S.2d 583 (1967), *aff'd mem.* 21 N.Y.2d 743, 234 N.E.2d 842, 287 N.Y.S.2d 888 (1968); Marko v. Philadelphia Transp. Co., 420 Pa. 124, 216 A.2d 502 (1966). *But see* Gullborg v. Rizzo, 331 F.2d 557 (3d Cir. 1964); *In re* Bradley's Estate, 50 Misc. 2d 72, 269 N.Y.S.2d 657 (Sur. Ct. 1966); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Acton v. Shields, 386 S.W.2d 363 (Mo. App. 1965); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); *In re* Logan's Estate, 4 Misc. 2d 283, 156 N.Y.S.2d 49 (Sur. Ct.), *aff'd mem.*, 2 App. Div. 2d 842, 156 N.Y.S.2d 152 (1956), *aff'd mem.*, 3 N.Y.2d

loss exists on which recovery can be based, due to the unavailability of evidence that the child would have contributed financially to its beneficiaries.[8] Thus, any damages would necessarily be founded upon conjecture, it being difficult, as a matter of law, to prove pecuniary loss resulting from such a death.[9] Nevertheless, it is only appropriate that a family which has suffered such a grevious loss should receive remuneration.[10]

Recovery has also been denied in preference to fostering fictitious claims,[11] since any right of action would be founded on speculation that the prenatal injury was the cause of death.[12] However, the advancement of medical science has led to the development of adequate safeguards against such fraudulent claims.[13]

Some jurisdictions have denied recovery because a child born dead

800, 144 N.E.2d 644, 166 N.Y.S.2d 3 (1957). *See generally* S. SPEISER, RECOVERY FOR WRONGFUL DEATH § 4:31 (1966).

In Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954), the court stated:

> Considering the highly speculative nature of the pecuniary value of an unborn child . . . it is apparent that practically everything that could be recovered in an action for the death of an unborn child can now be recovered by the mother in connection with her own claim for general damages. *Id.* at 180.

[8] *See* note 7 *supra.*

[9] Graf v. Taggert, 43 N.J. 303, 204 A.2d 140,144 (1964). In its decision the court recognized that the younger the child is, the more speculative the damages become:

> On the death of a very young child . . . at least some facts can be shown to aid in estimating damages as, for example, its mental and physical condition.
>
> But not even these scant proofs can be offered when the child is stillborn. It is virtually impossible to predict whether the unborn child, but for its death, would have been capable of giving pecuniary benefit to its survivors.

[10] *See* Panagopoulous v. Martin, 295 F. Supp. 220 (S.D.W. Va. 1969); White v. Yup, ... Nev. ..., 458 P.2d 617 (1969); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966).

[11] *See* Stokes v. Liberty Mut. Ins. Co., 202 So. 2d 794 (Fla. 1967); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433 (1963); Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954).

[12] *See* Powers v. City of Troy, 380 Mich. 160, 156 N.W.2d 530 (1968); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433 (1963); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958); Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935); Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926).

[13] *See* White v. Yup, ... Nev. ..., 458 P.2d 617 (1969); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); *In re* Bradley's Estate, 50 Misc. 2d 72, 269 N.Y.S.2d 657 (Sur. Ct. 1966); Hatala v. Markiewicz, 266 Conn. Supp. 358, 224 A.2d 406 (1966); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries,* 110 U. PA. L. REV. 553 (1962).

had no right of action at common law for prenatal injuries;[14] thus, no right of action can be transmitted to its personal representative under the wrongful death statute.[15] The *Lawrence* court acknowledged this reasoning in its decision. If the law recognizes unborn children sufficiently to protect them against the crimes of others,[16] in addition to conserving their inheritance[17] and property rights,[18] it should also recognize their separate existence for the purpose of redressing torts.[19]

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[14] *See* Padillow v. Elrod, 424 P.2d 216 (Okla. 1967); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958); Howell v. Rushing, 261 P.2d 217 (Okla. 1953); Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Newman v. City of Detroit, 281 Mich. 60, 274 N.W. 710 (1937); Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (1884).

[15] *See* Padillow v. Elrod, 424 P.2d 216 (Okla. 1967); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958); Howell v. Rushing, 261 P.2d 217 (Okla. 1953); Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Annot., 10 A.L.R.2d 1059 (1950); Annot., 27 A.L.R.2d 1256 (1953); Annot., 15 A.L.R.3d 992 (1967).

[16] *See generally* Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); State v. Siciliano, 21 N.J. 249, 121 A.2d 490 (1956); Mallison v. Pomeroy, 205 Ore. 690, 261 P.2d 225 (1955); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); *In re* Vince, 2 N.J. 443, 67 A.2d 141 (1949); Passley v. State, 194 Ga. 327, 21 S.E.2d 230 (1942); Guiffrida v. State, 61 Ga. App. 595, 7 S.E.2d 34 (1940); Cooper v. Blanck, 39 So. 2d 352 (La. App. 1923); State v. Atwood, 54 Ore. 526, 102 P. 295 (1909); Clarke v. State, 117 Ala. 1, 23 So. 671 (1898).

[17] *See, e.g.*, Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Lane v. Hatfield, 173 Ore. 79, 143 P.2d 230 (1943); Thomson v. Elliott, 152 Misc. 188, 273 N.Y.S. 898 (Child. Ct. 1934); Cooper v. Blanck, 39 So. 2d 352 (La. App. 1923); Tomlin v. Laws, 301 Ill. 616, 134 N.E. 24 (1922); Chandler v. Chandler, 147 Ga. 561, 94 S.E. 995 (1918); Scull v. Aetna Life Ins. Co., 132 N.C. 30, 43 S.E. 504 (1903); Hall v. Hancock, 32 Mass. (15 Pick.) 255 (1834.)

[18] *See, e.g.*, Turnett v. Keaton, 266 F.2d 572 (5th Cir. 1959); Mallison v. Pomeroy, 205 Ore. 690, 291 P.2d 225 (1955); Scott v. McPheeters, 33 Cal. App. 2d 629, 92 P.2d 678 (1939); Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935); Chester Park Co. v. Schulte, 120 Ohio St. 273, 166 N.E. 13 (1929); Stanford v. St. Louis-San Francisco Ry., 214 Ala. 611, 108 So. 566 (1926); Cooper v. Blanck, 39 So. 2d 352 (La. App. 1923); Ramey v. Ramey, 195 Ky. 673, 243 S.W. 934 (1922); Scott v. Ratliff, 179 Ky. 267, 200 S.W. 462 (1918); Heath v. Heath, 114 N.C. 547, 19 S.E. 155 (1894).

[19] *See* Gullborg v. Rizzo, 331 F.2d 557 (3d Cir. 1964); Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); Leal v. C. C. Pitts Sand & Gravel Inc., 419 S.W. 2d 820 (Tex. 1967); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); Stidan v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).

The Virginia Supreme Court of Appeals, in quoting from a treatise[20] to interpret the wrongful death statute,[21] deleted the following essential passage from its reference:

> Legislative words derive vitality from the obvious purposes for which the statutes are enacted, and in the interpretation of a statute of *ambiguous terminology*, the proper course is to adopt that sense of the words which promotes in the *fullest manner* the object of the statute.[22]

At this juncture in the opinion the court began:

> The general rule, as to this matter, is that the words of a statute should receive their ordinary acceptation and significance, where such construction is consonant, and not at variance with the purpose of the statute, and does not thwart or defeat the same, or where it is not obvious from the statute that the evil to be suppressed, or the remedy to be advanced, requires that the construction be limited or enlarged.[23]

To include a prenatal viable child within the meaning of "person" promotes the purpose of the Virginia wrongful death statute, and requires that the intent of the statute be enlarged. The distorted allusion to the meaning of "person" by the court narrowed the extent to which the word could be construed so that the quoted explanation would coincide with its opinion.

Denying recovery because the prenatal infant is not a "person" imposes a stipulation that an actual birth must precede any consideration of a right of action for the child's subsequent death.[24] It is illogical to

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[20] 50 AM. JUR., *Statutes* § 307 (1942).

[21] VA. CODE ANN. § 8-633 (Cum. Supp. 1968).

[22] 50 AM. JUR., *Statutes* § 307 (1942) (emphasis added).

[23] 50 AM. JUR., *Statutes* § 307 (1942). The court could have located a basis for allowing a viable prenatal infant to be considered a "person" by referring to additional excerpts within the same treatise section:

> On the other hand, the rule that words of a statute are to be taken in their ordinary sense yields when necessary to effectuate the real purpose of the lawgiver, or whenever the case is clearly within the mischief sought to be prevented, and it is proper to *depart* from the *usual* and *natural*, or literal, meaning of words used in a statute where the application of the literal or commonly accepted meaning would operate to *defeat* the purpose of the statute. Under this rule, the motive upon which the legislature proceeded, or the end in view, or the purpose for which the statute was designed, may operate to *extend* or *enlarge* words of a narrow signification, or to restrain words of a general signification. (emphasis added).

[24] Stokes v. Liberty Mut. Ins. Co., 202 So. 2d 794 (Fla. 1967); *In re* Bradley's

allow recovery to depend upon whether death from fatal injuries occurs before or after birth.[25] A viable child is an entity that can live and grow, mentally and physically, if separated prematurely from the mother,[26] and it is contradictory to deny this living being the right

Estate, 50 Misc. 2d 72, 269 N.Y.S.2d 657 (Sur. Ct. 1966); Keyes v. Construction Serv., Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Hogan v. McDaniel, 204 Tenn. 235, 319 S.W.2d 221 (1958). *See* Powers v. City of Troy, 380 Mich. 160, 156 N.W.2d 530 (1968); Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433 (1963); Greenberg v. Stanley, 30 N.J. 485, 153 A.2d 833 (1959); Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); Smith v. Luckhardt, 299 Ill. App. 100, 19 N.E.2d 446 (1939). *See generally* Goodrich v. Moore, 8 Mich. App. 725, 155 N.W.2d 247 (1967); Padillow v. Elrod, 424 P.2d 16 (Okla. 1967); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Occhipinti v. Rheem Mfg. Co., 252 Miss. 172, 172 So. 2d 186 (1965); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Shousha v. Matthews Drivurself Serv., Inc., 210 Tenn. 384, 358 S.W.2d 471 (1962); Howell v. Rushing, 261 P.2d 217 (Okla. 1953); Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921); Finer v. Nichols, 138 S.W. 889 (Mo. 1911).

[25] *See* Gullborg v. Rizzo, 331 F.2d 557 (3d Cir. 1964); Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964); Panagopoulous v. Martin, 295 F. Supp. 220 (S.D.W.Va. 1969); Wendt v. Lillo, 182 F. Supp. 56 (N.D. Iowa 1960); White v. Yup, ... Nev. ..., 458 P.2d 617 (1969); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); Leal v. C. C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. 1967); Fowler v. Woodward, 224 S.C. 608, 138 S.E.2d 42 (1964); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Stidan v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Worgan v. Greggo & Ferrara, 50 Del. (11 Terry) 258, 128 A.2d 557 (1956); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).

That recovery for prenatal injuries should be denied and the wrongdoer exculpated solely because the injuries negligently inflicted were sufficiently severe to produce the death of the unborn child has been described as an "absurd" result. Stidan v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106, 108 (1959).

[26] Orange v. State Farm Mut. Auto. Ins. Co., 443 S.W.2d 650, 651 (Ky. 1969); White v. Yup, ... Nev. ..., 458 P.2d 617, 620 (1969); Torrigan v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926, 928 (1967); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406, 407 (1966); Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448, 451 (1962); Stidan v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106, 108 (1959); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249, 251 (1957); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434, 439 (1954). *See* Panagopoulous v. Martin, 295 F. Supp. 220 (S.D.W. Va. 1969); Mace v. Jung, 210 F. Supp. 706 (D. Alaska 1962); Wendt v. Lillo, 182 F. Supp. 56 (N.D. Iowa 1960); Bonbrest v. Kotz, 65 F. Supp. 138 (D.C. Cir. 1946); State *ex rel.* Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. App. 1951). *See generally* Acton v. Shields, 386 S.W.2d 363 (Mo. 1965); Seattle-First Nat'l Bank v. Rankin, 59 Wash. 2d 288, 367 P.2d 835 (1962); Prates v. Sears, Roebuck & Co., 19 Conn. Supp. 487, 118 A.2d 633 (1955); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).

It has also been held that a child injured during the prenatal period could recover for wrongfully inflicted injuries even if not "viable". However, a live birth was necessary. Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958).

to come under the aegis of the wrongful death statutes as a "person" within their meaning and intent.[27]

Refusal to grant a remedy in stillbirth cases is unjustified because the conduct is no different than if the victim were *in esse* at the time of the injury.[28] The increasing recognition of a right of action for wrongful death of a stillborn infant[29] creates a need for modification by judicial

[27] *See* Todd v. Sandidge Constr. Co., 341 F.2d 75 (4th Cir. 1964); Panagopoulous v. Martin, 295 F. Supp. 220 (S.D.W. Va. 1969); White v. Yup, — Nev. —, 458 P.2d 617 (1969); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); Hatala v. Markiewicz, 26 Conn. Supp. 358, 224 A.2d 406 (1966); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Stidan v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. App. 1951); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949).

[28] *See* Panagopoulous v. Martin, 295 F. Supp. 220 (S.D.W. Va. 1969); White v. Yup, ... Nev. ..., 459 P.2d 617 (1969); Orange v. State Farm Mut. Auto. Ins. Co., 443 S.W.2d 650 (Ky. 1969); Torigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); Fowler v. Woodward, 244 S.C. 608, 138 N.E.2d 42 (1964); Stidan v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949). *See generally* Mace v. Jung, 210 F. Supp. 706 (D. Alaska 1962); Hatala v. Markiewicz, 26 Conn. Supp. 358, 228 A.2d 406 (1966); Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Valence v. Louisiana Power & Light Co., 50 So. 2d 847 (La. App. 1951); Amann v. Faidy, 415 Ill. 422, 114 N.E.2d 412 (1953).

[29] One federal circuit court has allowed recovery because to do so corresponded to the weight of authority. Gullborg v. Rizzo, 331 F.2d 557 (3d Cir. 1964). A federal district court has indicated that recovery would be allowed as a result of the overwhelming trend today. Wendt v. Lillo, 182 F. Supp. 56 (N.D. Iowa 1960).

Eleven jurisdictions expressly prohibit a right of action for the wrongful death of a viable unborn fetus. Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969); Goodrich v. Moore, 8 Mich. App. 725, 155 N.W.2d 247 (1967); Stokes v. Liberty Mut. Ins. Co., 202 So. 2d 794 (Fla. 1967); Padillow v. Elrod, 424 P.2d 16 (Okla. 1967); *In re* Bradley's Estate, 50 Misc. 2d 72, 269 N.Y.S.2d 657 (Sur. Ct. 1966); Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964). *But see* Gullborg v. Rizzo, 331 F.2d 557 (3d Cir. 1964); Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433 (1963); Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951). In *Drabbels*, the court based its decision primarily on lack of precedent. Since that time the majority of states have provided adequate precedent, and the language of the *Drabbels* decision indicated that if there were precedent in other states, the court would follow.

Fifteen jurisdictions have held that an action for the wrongful death of an unborn child is maintainable where the fetus was viable at the time of injury. Panagopoulous v. Martin, 295 F. Supp. 220 (S.D.W. Va. 1969); Wendt v. Lillo, 182 F. Supp. 56 (N.D. Iowa 1960); White v. Yup, — Nev. —, 458 P.2d 617 (1969); Orange v. State Farm Mut. Auto. Ins. Co., 443 S.W.2d 650 (Ky. 1969); Kwaterski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 14, 148 N.W.2d 107 (1967); Fowler v. Woodward, 244

administration, or in the alternative, legislative amendment of the wrongful death statutes in those jurisdictions not acknowledging such right of action.

The Virginia General Assembly has extended the meaning of "person" to embrace bodies politic and corporate as well as individuals.[30] A further augmentation to include a prenatal viable child within the meaning of "person" is necessary and logical.

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S.C. 608, 138 S.E.2d 42 (1964); State *ex rel.* Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); Stidan v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959); Poliquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Worgan v. Greggo & Ferrara, Inc., 50 Del. (11 Terry) 258, 128 A.2d 557 (1956); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949). The trend of authority is toward allowing recovery for fatal prenatal injuries resulting in stillbirth. The courts are recognizing the fact that a viable prenatal child is an entity that is entitled to be protected as is every other person.

The question as to the right of recovery for the loss of a child has also arisen in cases involving personal injuries resulting in a miscarriage. While such injuries are actionable, and compensation should be awarded for physical and mental suffering, it is generally held that no recovery can be had for the death of the unborn child. *See, e.g.*, Berg v. New York Soc'y, 136 N.Y.S.2d 528 (Sup. Ct. 1964), *rev'd on other grounds*, 286 App. Div. 783, 146 N.Y.S.2d 548 (1955); Webb v. Snow, 102 Utah 435, 132 P.2d 114 (1942); Malone v. Monongahela Valley Traction Co., 104 W. Va. 417, 140 S.E. 340 (1927); Wallace v. Portland Ry., Light & Power Co., 88 Ore. 221, 170 P. 283 (1918); Hosty v. Moulton Water Co., 39 Mont. 310, 102 P. 568 (1909); Witrack v. Nassau Elec. Ry., 52 App. Div. 234, 65 N.Y.S. 257 (1900); Thomas v. Gates, 126 Cal. 1, 58 P. 315 (1899); Western Union v. Cooper, 71 Tex. 507, 9 SW. 598 (1888).

[30] VA. CODE ANN. § 1-13.19 (1966).

Right to Counsel at Pre-trial Photographic Identification—*United States v. Collins*

The right of the accused to have the assistance of counsel at his criminal trial is clearly recognized both at the federal[1] and state[2] level. The application of this right to other proceedings, particularly those before trial, has vexed the courts of this country ever since the Supreme Court ruled that an accused person shall have the guidance of counsel at every step of the proceedings against him.[3] A pretrial confrontation merely for identification purposes between the accused and the prosecution can "settle the accused's fate and reduce the trial itself to a mere formality." [4] To meet this possibility the right to assistance of counsel has been extended to critical stages of the proceedings.[5]

Concentrating on pretrial identification procedures, the Supreme Court in *United States v. Wade*[6] and *Gilbert v. California*[7] has held a

[1] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U. S. CONST. amend. VI. This right was developed in the federal courts in a series of three cases. Johnson v. Zerbst, 304 U.S. 458 (1938); Walker v. Johnston, 312 U.S. 275 (1941); Glasser v. United States, 315 U.S. 60 (1942). Today this right is embodied in FED. R. CRIM. P. 44(a) which provides: "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment." *See also* Comment, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1003 (1964).

[2] Gideon v. Wainwright, 372 U.S. 335 (1963). Prior to this decision the right to counsel in state courts was guaranteed by the due process clause of the fourteenth amendment, as well as by state constitutional provisions. *Cf.* Cash v. Culver, 358 U.S. 633 (1959); Moore v. Michigan, 355 U.S. 155 (1957); Uveges v. Pennsylvania, 335 U.S. 437 (1948). All states have provisions similar to the sixth amendment in their constitutions except Virginia where the "law of the land" clause has been held to embrace the right to counsel. Fitzgerald v. Smyth, 194 Va. 681, 74 S.E.2d 810 (1953). Cottrell v. Commonwealth, 187 Va. 351, 46 S.E.2d 413 (1948).

[3] Powell v. Alabama, 287 U.S. 45, 69 (1932).

[4] United States v. Wade, 388 U.S. 218, 224 (1967).

[5] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (custodial interrogation); Escobedo v. Illinois, 378 U.S. 478 (1964) (custodial interrogation); White v. Maryland, 373 U.S. 59 (1963) (pleading before a Maryland magistrate); Hamilton v. Alabama, 368 U.S. 52 (1961) (arraignment under Alabama law). For cases holding certain stages not to be critical *see, e.g.*, Gilbert v. California, 388 U.S. 263 (1967) (taking of handwriting exemplars); United States v. Wade, 388 U.S. 218 (1967) (systematic taking of fingerprints and blood samples, plus examination of clothing and hair); Schmerber v. California, 384 U.S. 757 (1966) (taking of blood test to determine alcohol content). *But see* Roberts v. State, 458 P.2d 340 (Alaska 1969), which held a suspect had a right to counsel at the taking of handwriting samples under the constitution of Alaska.

[6] 388 U.S. 218 (1967).

[7] 388 U.S. 263 (1967). The application of these decisions is limited to lineups occurring

post-indictment lineup to be a critical stage at which the accused has the right to counsel. The Court in broad sweeping phrases referred to the possible prejudicial nature of such identifications,[8] but failed to state that the rulings are strictly applicable to lineups.[9] The novelty of this rationale, coupled with an indefiniteness as to its applicability,[10] has led to many cases attempting to delineate the extent of the decisions.[11]

One such case is *United States v. Collins*.[12] On the day Collins was arrested for the robbery of a federally insured bank he was identified as the robber by one of three government eyewitnesses at a lineup conducted in the presence of counsel. Later, in the absence of Collins and his counsel, the other two witnesses identified him from photographs of the lineup. None of the witnesses could make an in-court identification of Collins because he had lost seventy-five pounds during the ten month interim between the lineup and the trial.[13] Collins was convicted only after the District Judge admitted testimony of the pretrial identification on the grounds that there was complete spontaneity in the witnesses' decisions at the lineup and the presentation of the pictures. The Court of Appeals for the Fourth Circuit affirmed the conviction by refusing to extend *Wade* and *Gilbert* to the photographic identifications of Collins.[14]

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after June 12, 1967. Stovall v. Denno, 388 U.S. 293 (1967) (decided concurrently with *Wade* and *Gilbert*).

[8] *See* United States v. Wade, 388 U.S. 218, 228-35 (1967). *See The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 180-82 (1967).

[9] *See The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 180-82 (1967); 67 NW. U.L. REV. 251, 257-59 (1968).

[10] The Supreme Court set forth several reasons for holding a lineup to be a critical stage. United States v. Wade, 388 U.S. 218, 228-35 (1967). These same reasons could, in appropriate situations, be applied to other pretrial identification procedures.

[11] Some courts have avoided the issue by applying the prospective rule of *Stovall*. *See, e.g.*, United States v. Black, 412 F.2d 687 (6th Cir. 1969); United States v. Marson, 408 F.2d 644 (4th Cir. 1968), *criticized in* 43 N.Y.U.L. REV. 1019 (1968); Wise v. United States, 383 F.2d 206 (D.C. Cir. 1967).

[12] 416 F.2d 696 (4th Cir. 1969).

[13] A fourth eyewitness, who was unable to identify Collins positively at the corporal lineup, the photographic display, or at trial, was called by the defense.

[14] In an attempt to bolster its decision, the Fourth Circuit also relied upon Simmons v. United States, 390 U.S. 377 (1968). Simmons was identified by photographs as the robber of a federally insured bank before he was arrested. The Supreme Court, in refusing to void Simmons' conviction, laid down a test to be applied to photographic identifications before the accused is in custody. "[E]ach case must be considered on its own facts, and . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to

The right to counsel at pretrial identification procedures other than lineups has been upheld in many cases subsequent to *Wade* and *Gilbert*.[15] Various arguments, such as causing delay in prompt identification and obstructing the confrontations,[16] have been made to deny the

a very substantial likelihood of irreparable misidentification." *Id.* at 384. This test is an application of the "totality of circumstances" test set down in Stovall v. Denno, 388 U.S. 293 (1967): "[A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . . ." *Id.* at 302. The Fourth Circuit applied both tests and found no imperiling circumstances or impermissible suggestiveness in the showing of the photographs to the two witnesses.

Two elements are essential in an application of the *Simmons* test: the accused must not be in custody and there must be an in-court identification. As was pointed out by Judge Winter in his dissent, the majority in *Collins* made such an application in the absence of these two factors. Other courts, in an effort to find an easy solution to the prejudice problem in photographic identifications, have overlooked the same requirements, especially the pre-arrest-post-arrest distinction. *See, e.g.*, Barber v. United States, 412 F.2d 775 (5th Cir. 1969); Rech v. United States, 410 F.2d 1131 (10th Cir. 1969). This is not the first time the Fourth Circuit has failed to note this distinction. *See* United States v. Marson, 408 F.2d 644 (4th Cir. 1968). However, a recent decision applied *Simmons* correctly to a pre-arrest situation. United States v. Butler, 405 F.2d 395 (4th Cir. 1968) (opinion by Judge Winter).

[15] *See, e.g.*, Mason v. United States, 414 F.2d 1176 (D.C. Cir. 1969); People v. Bryant, 60 Misc. 2d 808, 304 N.Y.S.2d 24 (Nassau County Ct. 1969) (informal unsupervised gatherings); People v. Fowler, 271 A.C.A. 214, 76 Cal. Rptr. 1 (1969); People v. C., 32 App. Div. 2d 840, 303 N.Y.S.2d 218 (Sup. Ct. 1969) (pre-indictment lineups); People v. Martin, 273 A.C.A. 724, 78 Cal. Rptr. 552 (1969); Commonwealth v. Cooper, — Mass. —, 248 N.E.2d 253 (1969) (identification through one way mirrors). *But see* Rivers v. United States, 400 F.2d 935 (5th Cir. 1968); United States v. Gilmore, 398 F.2d 679 (7th Cir. 1968); Cox v. State, 219 So. 2d 762 (Fla. 1969) (video tape replays for witnesses); Watson v. State, 7 Md. App. 225, 255 A.2d 103 (1969) (one to one confrontations between the accused and witnesses) State v. Williams, 6 N.C. App. 14, 169 S.E. 2d 231 (1969) (no right to counsel where witness viewed the accused through a one way mirror merely to determine if the police had in custody the man the witness had previously described).

Several cases have held such confrontations under proper circumstances not to violate due process. *See, e.g.*, Biggers v. Tennessee, 390 U.S. 404 (1968); Clemons v. United States, 408 F.2d 1230 (D.C. Cir. 1968); Hanks v. United States, 388 F.2d 171 (10th Cir.), *cert. denied*, 393 U.S. 863 (1968).

The right to counsel, however, is not usually applied to on-the-scene identifications. Solomon v. United States, 408 F.2d 1306 (D.C. Cir. 1969); Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969); Kennedy v. United States. 353 F.2d 462 (D.C. Cir. 1965); United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968); Commonwealth v. Bumpus, 354 Mass. 494, 238 N.E.2d 343 (1968). *But see* United States v. Kinnard, 294 F. Supp. 286 (D.D.C. 1968) (reluctant granting of a motion to suppress testimony of an on-the-scene identification with no counsel present). One court has also refused the right to counsel at a reenactment of the crime. People v. McClellan, 71 A.C. 831, 457 P.2d 871, 80 Cal. Rptr. 31 (1969).

[16] United States v. Wade, 388 U.S. 218, 237-38 (1967). *See also* Miranda v. Arizona, 384 U.S. 436, 480-81 (1966).

right to counsel at such pretrial identifications.[17] Although the right to counsel usually means the suspect's own counsel, the Supreme Court has suggested that substitute counsel may be justified to prevent a delay in identification, reasoning that any counsel may eliminate the hazards that make the lineup critical.[18] Counsel will not obstruct such procedures because he is merely protecting the rights of his client,[19] and, in essence, acting as a policeman's policeman.[20]

The Fourth Circuit did not discuss the underlying premises for and against counsel at such pretrial identification proceedings, but strictly construed *Wade* to deal only with the peculiar features of a lineup.[21] The Supreme Court in deciding *Wade* and *Gilbert* placed much emphasis on the inability of the defense to reconstruct at trial the manner of identification at the lineup.[22] Counsel is required to preserve the most basic right of the criminal defendant—his right to a fair trial at which witnesses against him can be cross-examined meaningfully.[23] Implicit in

[17] The Supreme Judicial Court of Maine has gone so far as to say pre-arrest proceedings are investigatory and not critical, therefore counsel is not required. State v. Butler, Me., 256 A.2d 588 (1969).

[18] United States v. Wade, 388 U.S. 218, 237 n. 27 (1967).

[19] *Id.* at 238. *See also* Miranda v. Arizona, 384 U.S. 436, 480-81 (1966).

[20] *See The Supreme Court, 1966 Term,* 81 HARV. L. REV. 69, 176-78 (1967); 63 Nw. U.L. REV. 251, 259 (1968). The additional problem of forcing the prosecution to reveal the identity of certain witnesses it wishes to conceal can be averted by having the witnesses wear masks. *See* United States v. Wade, 388 U.S. 218, 238 n. 28 (1967). There also may be an infringement upon the state's power to investigate outside the presence of counsel, but counsel may help eliminate any taint upon the prosecution's identification evidence. *Id.* at 238. Another hazard to be considered is the ethical problem that may arise when the only way the prejudice observed by counsel at a lineup can be brought out at trial is by counsel taking the stand. *See* 63 Nw. U.L. REV. 251, 259 (1968).

[21] Judge Bryan, speaking for the majority, said:

> These authorities do not condemn all identifications not made through a lineup. That is not the lesson of *Wade* and *Gilbert.* The Court there dealt with inescapable features of a lineup, and its demand for counsel was unconditional solely because of these unavoidably indwelling and peculiar circumstances. It did not pretend to outlaw, per se, those means of identification which are not fraught with these or like potential dangers.

United States v. Collins, 416 F.2d 696, 699 (4th Cir. 1969).

[22] United States v. Wade, 388 U.S. 218, 228-32 (1967).

[23] In *Collins* the majority formulated the major issue of the case as follows: "The question, then, is whether under *Wade* and *Gilbert* the presence of counsel was mandatory—*to insure against a breach of due process*—when the pictures of the lineup are [*sic*] first laid before the lineup absentees." (emphasis added). United States v. Collins, 416 F.2d 696, 699 (4th Cir. 1969). Mr. Justice Brennan, writing for the majority in *Wade,* did not mention that counsel should be present to prevent a violation of due process. Counsel was required to preserve the defendant's right to a fair trial with its features of confrontation and cross-examination of witnesses.

A possible basis for the Fourth Circuit's statement may be found in some recent

the court's reasoning are the unreliability of eyewitness identification and the grave potential for intentional or unintentional suggestion in the way suspects are presented to witnesses at a lineup.[24]

Under certain circumstances there could be as much prejudicial influence in the display of photographs as in a lineup.[25] In such a case the reasoning of the Supreme Court that made a lineup a critical stage of the proceedings could be applied to a post-arrest photographic identification proceeding.[26] Because neither the accused nor his counsel would

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decisions of that court. Even before *Wade* a voice identification by the prosecuting witness without a physical confrontation or comparison with other voices was held to violate due process. Palmer v. Peyton, 359 F.2d 199 (4th Cir. 1966). This decision was the only case cited by the Supreme Court in establishing the "totality of circumstances" test. Stovall v. Denno, 388 U.S. 293, 302 (1967). *See* note 14 *supra*. In United States v. Marson, 408 F.2d 644 (4th Cir. 1968), the *Stovall* test was applied to a photographic identification and no deprivation of due process was found. This was a pre-*Wade* identification, and in such cases, other courts have also applied *Stovall*. *See* Foster v. California, 394 U.S. 440 (1969); United States v. Lipowitz, 407 F.2d 597 (3d Cir. 1969); Hemphill v. United States, 402 F.2d 187 (D.C. Cir. 1968); Lesoine v. Commonwealth, 209 Va. 399, 164 S.E.2d 642 (1968).

In two recent per curiam decisions the defendants claimed that their pretrial identifications were prejudicial and, hence, a denial of due process. United States v. Anderson, 406 F.2d 719 (4th Cir. 1969); United States v. Davis, 407 F.2d 846 (4th Cir. 1969). In examining the facts carefully in both cases, the court found no violation of due process. Neither case dealt with right to counsel and both were decided under due process standards.

In *Collins* the Fourth Circuit was again faced with the argument of right to counsel at photographic identifications, which it avoided in United States v. Marson, 408 F.2d 644 (4th Cir. 1968). *See* note 11 *supra*. Having decided recent lineup cases under due process standards, the Fourth Circuit attacked Collins' identification in the same manner. After stating counsel would be required to prevent a breach of due process, the majority then proceeded into a discussion of whether due process was violated when the pictures were shown to the witnesses. *Wade* and *Gilbert* did not encompass a due process argument. The Fourth Circuit should have used more care to distinguish between Collins' right to counsel argument and his due process argument.

[24] United States v. Wade, 388 U.S. 218, 228-36 (1967). The Supreme Court also noted that a witness having once identified a suspect is hesitant to go back on his word, and that the accused's fate can be sealed at a pretrial identification. *Id.* at 229, 235.

[25] *See* Simmons v. United States, 390 U.S. 377, 383-84 (1968); United States v. Trivette, 284 F. Supp. 720, 721-23 (D.D.C. 1968); State v. Thompson, — Nev. —, 451 P.2d 704, 706 (1969); P. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES 74-77 (1965).

[26] *See The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 181 (1967); 43 N.Y.U. L. REV. 1019 (1968) (Counsel should be present at photographic displays after the accused is in custody because of the great possibility of prejudice.). Even the prosecution in *Wade* admitted there was no meaningful distinction between photographic identifications and lineup identifications. Brief for Appellant at 14, United States v. Wade, 388 U.S. 218 (1967). One authority states that the right to counsel "is unquestioned at and during the trial stage, and even before and after this critical period,

be present, there could be no way to show at trial that there were unconscious suggestions made to the witnesses. Blatant suggestiveness, however, could be brought out at trial when the identification witnesses are examined by the court and defense counsel to determine the basis for their identification.[27]

The Fourth Circuit dealt with a situation where there was no evidence of prejudice in the record at all. This was emphatically pointed out by the court on several occasions. Yet Collins called on the court to establish a rule that counsel is required at a post-arrest display of photographs for identification purposes. The Fourth Circuit, however, refused to set up a per se rule in the absence of facts warranting the establishment of such a rule.[28]

If the tenet is adopted that *Wade* applies to all pretrial identification procedures[29] fraught with the same dangers as a lineup, then *Collins*

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e.g. at any identification, lineup, *or analogous compelled situation . . .*" (emphasis added). M. FORKOSCH, CONSTITUTIONAL LAW 501 (2d ed. 1969).

[27] Identification by photograph is at least as unreliable as physical identification. *See* 63 Nw. U.L. REV. 251, 258 (1968). The reasons stated in note 20, *supra*, could also be applied to a photographic identification to make it a critical stage. In addition, with photographs there is the problem that the witness may retain in his mind's eye the image in the photograph rather than the person he actually saw. *See* Simmons v. United States, 390 U.S. 377, 383-84 (1968); United States v. Wade, 388 U.S. 218, 235-36 (1967); United States v. Johnson, 412 F.2d 753, 754 (1st Cir. 1969).

Few cases have arisen dealing with photographic identification after the accused is in custody. Several of these have assumed *Wade* applied but were decided upon other bases. *See, e.g.*, Miller v. State, 7 Md. App. 344, 255 A.2d 459 (1969); State v. Carrothers, 79 N.M. 347, 443 P.2d 517 (1968).

The Nevada Supreme Court recently held that *Wade* and *Gilbert* apply to photographic identifications held in lieu of a lineup. State v. Thompson, — Nev. —, 451 P.2d 704 (1969). Another recent case involved a factual situation similar to that presented in *Collins*. The accused was in custody for assault and kidnapping when the victim identified him from a photograph of the suspect in a lineup. The picture was made specifically for viewing by the witness, and no counsel was present when the photograph was taken. The California Court of Appeals, Fourth District, held the accused had no right to counsel at the photographic identification because *Wade* and *Gilbert* applied only to physical confrontations and not the viewing or the preparation of the photographs. People v. Lawrence, 276 A.C.A. 359, 81 Cal. Rptr. 91 (1969). *Accord,* United States v. Bennett, 409 F.2d 888 (2d Cir. 1969); People v. Padgitt, 264 Cal. App. 2d 443, 70 Cal. Rptr. 345 (1968); Baldwin v. State, 5 Md. App. 22, 245 A.2d 98 (1968).

Most cases concern pre-arrest identifications by photograph. *See, e.g.*, Simmons v. United States, 390 U.S. 377 (1968); United States v. Butler, 405 F.2d 395 (4th Cir. 1968); United States v. Clark, 289 F. Supp. 610 (E.D.Pa. 1968).

[28] In recent cases involving the rights of a criminal defendant, the Supreme Court has laid down per se rules only in cases where the facts have shown prejudice toward the defendant. *See* cases cited note 5 *supra*.

[29] For discussion as to the practical problems involved in extending *Wade* and

can lead to an evasion of the *Wade* rule. The Fourth Circuit refused to adopt such a tenet and strictly construed *Wade* and *Gilbert* to apply only to lineups. These decisions, it was held, apply only to the peculiar features of a congregation of people in a lineup. Counsel is required at a lineup to prevent any prejudice in the way the suspects are presented to the witnesses. In *Collins* that danger is considerably weakened by proof that the presentation of the suspect at the lineup was impartial. Of course, witnesses may be clued when the pictures are displayed. By the same token, the witnesses to a lineup may be coached before they reach the stationhouse. In both cases the defendant should have the burden of showing he was prejudiced by what transpired between the authorities and the witnesses. Any prejudice could only be brought out, if at all, during the trial when the sources of the witnesses' identifications are examined. Admittedly, this is a heavy burden to place on the defendant, but the line must be drawn somewhere. Recent Supreme Court decisions[30] have required the authorities not to engage in any activity that might prejudice the accused. Any extension of *Wade* and *Gilbert* to pretrial photographic identification procedures customarily held outside the presence of counsel should be made by the Supreme Court, and then only on facts that warrant such an extension.[31]

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Gilbert to all pretrial identifications, *see* 14 VILL. L. REV. 535 (1969). For discussion of the impact of these cases on pretrial identification procedures, *see* Comment, *The Right to Counsel at Lineups: Wade and Gilbert in the Lower Courts*, 36 U. CHI. L. REV. 830 (1969).

[30] *See* cases cited note 5 *supra*.

[31] State v. Thompson, — Nev. —, 451 P.2d 704, 708 (1969) (dissent by Collins, C. J.).

Constitutional Law—Long Hair Bans in Public Schools—*Griffin v. Tatum* and *Crews v. Cloncs*

The fourteenth amendment's guaranties of substantive due process and equal protection require laws and governmental acts to be reasonable and substantially related to legitimate government objectives.[1] Under the reasonableness test,[2] judges are theoretically not to consider their own opinions as to the wisdom or desirability of a law,[3] but they are merely to determine whether it is arbitrary or capricious.[4] However, reasonableness as a standard of constitutionality involves a considerable degree of subjective judgment which cannot be divorced from the particular judge's social and political beliefs.

Restrictions and bans on students in public schools come within the test of reasonableness.[5] The courts agree that school restrictions, in order to fall outside of the scope of protected student rights, must be reasonable and necessary for appropriate order and discipline,[6] or for

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[1] Oriental Boulevard Co. v. Heller, 58 Misc. 2d 920, 297 N.Y.S.2d 431 (Sup. Ct. 1969). A law or regulation must be reasonable in relation to its subject, classification, and goal. *See* Defiance Milk Products Co. v. Du Mond, 309 N.Y. 537, 132 N.E.2d 829 (1956); Heimgaertner v. Benjamin Elec. Co., 6 Ill. 2d 152, 128 N.E.2d 691 (1955); Jack Lincoln Shops, Inc. v. State Dry Cleaners' Bd., 192 Okla. 251, 135 P.2d 332 (1943). *See generally* Burnet v. Wells, 289 U.S. 670 (1933). *But cf.* Sproles v. Binford, 286 U.S. 374, 388 (1932).

[2] Reasonableness is the essence of substantive due process. *See* Board of Educ. v. Bentley, 383 S.W.2d 677 (Ky. 1964); Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924); McLeod v. State, 154 Miss. 468, 122 So. 737 (1929).

[3] Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923); Board of Educ. v. Bentley, 383 S.W.2d 677 (Ky. 1964); Oriental Boulevard Co. v. Heller, 58 Misc. 2d 920, 297 N.Y.S. 431 (Sup. Ct. 1969); Defiance Milk Products Co. v. Du Mond, 309 N.Y. 537, 132 N.E.2d 829 (1956).

[4] *See* Avery v. Midland County, 390 U.S. 474 (1968); Loving v. Virginia, 388 U.S. 1 (1967).

[5] *See* Robinson v. Board of Educ. of St. Mary's County, 143 F. Supp. 481 (D. Md. 1956); Fertich v. Michener, 111 Ind. 472, 11 N.E. 605 (1887). *See generally* Dove v. Parham, 181 F. Supp. 504 (E.D. Ark. 1960), *aff'd*, 282 F.2d 256 (8th Cir. 1960); Holt v. Raleigh Bd. of Educ., 164 F. Supp. 853 (E.D.N.C. 1958), *aff'd*, 265 F.2d 95 (4th Cir. 1959), *cert. denied*, 361 U.S. 818 (1959).

[6] *See, e.g.*, Tinker v. Des Moines School Dist., 393 U.S. 503 (1969)); Westly v. Rossi, 305 F. Supp. 706 (D. Minn. 1969); Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969); Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis. 1969); Ferrell v. Dallas Independent School Dist., 261 F. Supp. 545 (N.D. Tex. 1966), *aff'd*, 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968); State *ex rel.* Ronish v School Dist. No. 1, 136 Mont. 453, 348 P.2d 797 (1960).

the protection of the rights of others,[7] or for the health and safety of students.[8] One of the most controverted areas of school bans deals with students who have unusually long hair.

In *Griffin v. Tatum*[9] a high school student was suspended for refusing to cut his hair to the regulation length. The school maintained that long hair was distracting and that it generated resentment by other students who disliked nonconformity. The court concluded that the hair restriction was arbitrary and violative of the fourteenth amendment, and held that the school's justification completely failed under the test of reasonableness.

Crews v. Cloncs[10] likewise involved the suspension of a high school boy for not conforming to the school's hair length regulation. In this case the court relied primarily on statements of school authorities that long hair results in disruption and health problems as justification for the regulation. The court held that the rule against long hair was not arbitrary or unreasonable, and that it did not violate the student's rights of substantive due process and equal protection under the fourteenth amendment.[11]

Despite the adherence of both *Griffin* and *Crews* to the standard of reasonableness, the two courts do not agree as to what this really means in terms of justification in a factual situation, a divergence which is typical of other long hair cases.[12] Since a judge has great individual latitude to determine what is reasonable, and since there are no United States Supreme Court decisions on long hair bans,[13] the permissible length of a student's hair may depend upon where his school is located.

In the early cases on student rights the courts were reluctant to strike

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[7] Tinker v. Des Moines School Dist., 393 U.S. 503, 513 (1969). *See* Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

[8] *See* cases cited note 6 *supra*.

[9] 300 F. Supp. 60 (M.D. Ala. 1969).

[10] 303 F. Supp. 1370 (S.D. Ind. 1969).

[11] The court maintained that no harm would result to the student's personality or individuality if he were forced to conform. *Id.* at 1377.

[12] *See* Westly v. Rossi, 305 F. Supp. 706 (D. Minn. 1969); Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969); Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis. 1969); Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967), *aff'd*, 408 F.2d 1085 (5th Cir. 1969); Ferrell v. Dallas Independent School Dist. 261 F. Supp. 545 (N.D. Tex. 1966), *aff'd*, 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968); Leonard v. School Comm. of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965).

[13] However, the United States Supreme Court denied certiorari in a case that sustained a long hair ban as a reasonable exercise of discretionary authority. Ferrell v. Dallas Independent School Dist., 261 F. Supp. 545 (N.D. Tex. 1966), *aff'd*, 329 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968).

down school regulations. In those cases, a rule forbidding the use of cosmetics, transparent hosiery, and low-necked dresses,[14] and rules requiring students to wear prescribed uniforms[15] were sustained as constitutional. Later cases showed a greater willingness of the courts to critically examine school regulations for abuses of discretion, but the courts have always refused to encroach on the proper exercise of discretionary authority by school officials.[16]

The issue of whether a student can determine the length of his own hair is not a trivial matter,[17] since the vigilant defense of freedoms is especially important in public schools where youth are prepared to be productive members of our democracy.[18] Indeed, the guidance of students should reflect a microcosm of our free society and not be confined in a straitjacket of conformity.[19] Experience with diversity and adaptation to differences are more important to the survival of our system than striving for homogeneity.[20]

At a time when many educational institutions are faced with turmoil, some courts may be feeding the fires of discontent by accepting flimsy justification for long hair restrictions. If students find constitutional rights or fundamental liberties being treated lightly in public schools, they may discount vital principles of our democracy as mere platitudes.[21] Far less drastic measures than suspending the students or forcing them to conform to an official hair standard can be taken by schools,

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[14] Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923).

[15] A requirement of an agricultural high school that students wear a uniform at school and public places within a five mile radius of the school, even on Saturday and Sunday, was sustained as reasonable. Jones v. Day, 127 Miss. 136, 89 So. 906 (1921). A rule which forced state college students to wear an official uniform was sustained as a proper exercise of school authority. Connell v. Gray, 33 Okla. 591, 127 P. 417 (1912).

[16] *See* cases cited note 12 *supra.*

[17] *See* Breen v. Kahl, 296 F. Supp. 702 (W.D. Wis. 1969).

[18] *See* Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960). *See generally* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (dictum).

[19] *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (dictum). In support of this view Mr. Justice McReynolds, delivering the opinion of the court, said that "[i]n order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest. . . ." *Id.* at 402. *See* cases cited note 18 *supra;* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

[20] Breen v. Kahl, 296 F. Supp. 702, 709 (W.D. Wis. 1969) (dictum).

[21] *See* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (dictum).

as pointed out in *Griffin*,[22] to remedy problems allegedly caused by long hair.

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[22] "If combing hair or passing combs in classes is distracting, the teachers, in the exercise of their authority, may stop this without requiring that the head be shorn. If there is congestion at the girls' mirrors, or if the boys are late for classes because they linger in the restrooms grooming their hair, appropriate disciplinary measures may be taken to stop this without requiring a particular hair style. If there is any hygienic or other sanitary problem in connection with those students who elect to wear their hair longer than that presently permitted by the regulation there are ways to remedy this other than by requiring their hair shorn. The same is true of their failure to participate in the physical education programs. As to the fear that some students might take action against the students who wear hair longer than the regulation now permits, suffice it to say that the exercise of a constitutional right cannot be curtailed because of an undifferentiated fear that the exercise of that right will produce a violent reaction on the part of those who would deprive one of the exercise of that constitutional right." Griffin v. Tatum, 300 F. Supp. 60, 63 (M.D. Ala. 1969).

Federal Courts—DIVERSITY OF CITIZENSHIP—APPOINTMENT OF OUT-OF-STATE ADMINISTRATOR—*Lester v. McFaddon*

When litigation is commenced between parties of different states, diversity of citizenship exists as a basis for federal jurisdiction.[1] Although many artificial methods of manufacturing diversity have been created,[2] the federal courts have refused to take jurisdiction unless the nature of the diversity is purely interstate.[3] In order to facilitate the federal courts in screening out improper diversity situations, Congress enacted § 1359 of the Judicial Code,[4] requiring a federal district court to refuse jurisdiction when ". . . any party, by assignment or otherwise, has been improperly or collusively[5] made or joined to invoke the jurisdiction of such court."

Recently, in the case of *Lester v. McFaddon*,[6] the Fourth Circuit Court of Appeals raised sua sponte[7] a jurisdictional question involving the interpretation of § 1359. A mother and child were struck by the defendant's vehicle, resulting in the mother's death. The accident occurred in South Carolina and all the parties involved were residents thereof. The child and the deceased's statutory beneficiaries, also residents of South Carolina, procured the appointment of a Georgia attorney as administrator of the estate for the purpose of bringing a

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[1] 28 U.S.C. § 1332(a) (1964). District courts are granted original jurisdiction of civil actions in which the matter in controversy exceeds $10,000 and is between:

"(1) citizens of different States;

(2) citizens of a State, and foreign states or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens thereof are additional parties."

See C. WRIGHT, FEDERAL COURTS § 23 (1963) for a discussion of why diversity of citizenship was allowed as a basis for federal jurisdiction.

[2] *See* Cohan and Tate, *Manufacturing Federal Diversity Jurisdiction by the Appointment of Representatives: Its Legality and Propriety*, 1 VILL. L. REV. 201 (1956).

[3] *See* Miller & Lux, Inc. v. East Side Canal Co., 211 U.S. 293 (1908); Lehigh Mining & Mfg. Co. v. Kelly, 160 U.S. 327 (1895). *See generally* Wright, *The Federal Courts—A Century After Appomattox*, 52 A.B.A.J. 742, 743 (1966).

[4] 28 U.S.C. § 1359 (1964). This section has existed in its present form only since the 1948 revision of the Judicial Code, but its purposes and content strongly parallel its predecessors.

[5] *See* Corabi v. Auto Racing, Inc., 264 F.2d 784, 788 (3d Cir. 1959) (very literal meaning given). *Contra*, Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969). The word "collusion" is a strong one. *See* 1 VILL. L. REV. 201, 245-47 (1956).

[6] 415 F.2d 1101 (4th Cir. 1969).

[7] The question of jurisdiction was not raised in the district court.

wrongful death action in the federal courts.[8] After consideration of the administrator's authority and duties, the court claimed to find no substantive interest on the part of the administrator.[9] Therefore, the court concluded that the appointment was secured solely for the purpose of invoking federal jurisdiction, thereby violating § 1359.[10]

Prior to *Lester*, the Fourth Circuit had not decided any jurisdictional question involving the interpretation of § 1359. The court, however, was prompted to hold the appointment collusive because of the recently decided case of *McSparran v. Weist*[11] in the Third Circuit.[12] In that case the court held that the appointment of a nonresident guardian for the purpose of creating diversity of citizenship was collusive within the meaning of § 1359.[13] Until the decision in the Third Circuit, diversity jurisdiction had never been defeated simply because one of the parties was a nonresident representative chosen solely to create jurisdiction.[14] The federal courts reasoned that to look beyond the state

[8] In South Carolina an action for wrongful death may be maintained only by an executor or administrator of the decedent's estate. The cause of action inheres in the personal representative, and the statutory beneficiaries cannot proceed in their own names. Lester v. McFaddon, 415 F.2d 1101, 1103 (4th Cir. 1969). *See* S.C. CODE ANN. § 10-1952 (1962).

[9] Because the decedent's general estate had no assets, Lester had no duties to perform prior to the suit. Therefore, unless some damages were recovered, his duties would have been nonexistent. Even in the event of recovery, ". . . his duty is limited to receipt of the funds and their disbursement to a guardian of the statutory beneficiaries." Lester v. McFaddon, 415 F.2d 1101, 1103 (4th Cir. 1969).

[10] *See generally* Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969). There an assignment was made for the sole purpose of creating diversity of citizenship. The assignment was held collusive within the scope of § 1359. The court, however, reserved the question of "whether, in cases in which suit is required to be brought by an administrator or guardian, a motive to create diversity jurisdiction renders the appointment of an out-of-state representative 'improper' or 'collusive'" within the meaning of § 1359." *Id.* at 828 n.9.

[11] 402 F.2d 867 (3d Cir. 1968), *cert. denied*, 395 U.S. 903 (1969), *noted in* 44 N.Y.U. L. REV. 212 (1969), 73 DICK. L. REV. 562 (1969), 44 NOTRE DAME LAW. 643 (1969), 47 N.C.L. REV. 926 (1969). The petitioner admitted that the appointment of a nonresident guardian was sought for the sole purpose of creating diversity.

[12] Recently, the Second Circuit held that the appointment of a nonresident administrator for the purpose of bringing a wrongful death action did not create diversity jurisdiction. O'Brien v. AVCO Corp., ... F.2d ... (2d Cir. 1969).

[13] The court stated that ". . . a nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest in the dispute or controversy, is improperly or collusively named." McSparran v. Weist, 402 F.2d 867, 873 (3d Cir. 1968).

[14] *See* Lang v. Elm City Constr. Co., 217 F. Supp. 873 (D. Conn.), *aff'd*, 324 F.2d 235 (2d Cir. 1963); County of Todd v. Loegering, 297 F.2d 470 (8th Cir. 1961); Corabi v. Auto Racing, Inc., 264 F.2d 784 (3rd Cir. 1959); McCoy v. Blakely, 217 F.2d 227 (8th Cir. 1954); Jaffe v. Philadelphia W.R.R., 180 F.2d 1010 (3d Cir. 1950);

appointment would involve the examination of motive, traditionally considered beyond judicial investigation in the area of federal diversity jurisdiction.[15] As a result, in order to invoke federal jurisdiction it was only necessary that a representative be properly appointed and have the power to bring the action in his own name.[16] It is well established by both statute and case law that an administrator is the real party in interest, in the sense of entitlement to proceed in his own name without joining the beneficiaries.[17] Coupling this fact with the refusal of courts to examine motive, the federal courts had no alternative but to discount the possibility of any impropriety or collusion, thereby giving § 1359 a very broad interpretation in the area of appointments.[18]

Manufactured Federal Diversity Jurisdiction and Section 1359, 69 COLUM. L. REV. 706 (1969). *See generally* Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931) (avoidance of federal jurisdiction); Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) (dictum).

[15] *See* Lang v. Elm City Constr. Co., 324 F.2d 235 (2d Cir. 1963); Jamison v. Kammerer, 264 F.2d 789 (3d Cir. 1959); Corabi v. Auto Racing, Inc., 264 F.2d 784 (3d Cir. 1959). *Contra,* Steinberg v. Toro, 95 F. Supp. 791 (D.P.R. 1951) (involved the examination of motive in connection with an assignment). *See generally* Lehigh Mining and Mfg. Co. v. Kelly, 160 U.S. 327 (1895). The court held there that reincorporation for the purpose of creating diversity was collusive. The decision turned not on motive, however, but on the fact that the transfer was "feigned and merely colorable." *See also* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928) (reincorporation for valid reasons); National Sur. Corp. v. Inland Properties, Inc., 286 F. Supp. 173 (E.D. Ark. 1968).

That it would be a collateral attack upon the state court was one rationale behind the courts not inquiring into motive. *See* Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183 (1931); Esposito v. Emery, 402 F.2d 878 (3d Cir. 1968) (dissent); Silvious v. Helmick, 291 F. Supp. 716 (N.D.W. Va. 1968). *Contra,* Lester v. McFaddon, 415 F.2d 1101 (4th Cir. 1969), where Judge Haynsworth, speaking for the court in rebutting the argument of collateral attack, said:

> Nor does it seem to us to matter in the least that the administrator owes his appointment to the decree of a probate court. . . . That decree is not under attack. The appointment may be assumed to be valid in every respect and the administrator perfectly free to prosecute the action in the state court. The question here is simply whether from the circumstances of his appointment . . . the statute proscribes his proceeding in the federal courts rather than in the state courts. That seems clearly a federal question, the answer to which need not be influenced by the fact that the state court has authorized him to proceed in the litigation. . . . *Id.* at 1105.

[16] Cases cited note 15 *supra.*

[17] FED. R. CIV. P. 17(a) (Cum. Supp. 1969) provides: "Every action shall be prosecuted in the name of the real party in interest. An executor, administrator [or] guardian . . . may sue in his own name without joining with him the party for whose benefit the action is brought. . . ." *See* Mexican Cent. Ry. v. Eckman, 187 U.S. 429 (1903) (general guardian); Childress v. Emory, 21 U.S. (8 Wheat.) 642 (1823) (executors); Chappedelaine v. Dechenaux, 8 U.S. (4 Cranch) 306 (1808). *But cf.* Martineau v. City of St. Paul, 172 F.2d 77 (8th Cir. 1949).

[18] *See* Lester v. McFaddon, 415 F.2d 1101 (4th Cir. 1969); 3A J. MOORE, FEDERAL

McSparran signaled the abrupt and surprising reversal of this policy. The court was of the opinion that, in view of the language of § 1359, motive could not possibly be ignored in ascertaining the purpose for which the representative was selected. Once removing this self-imposed blinder, the court was able to look beyond the state appointment and take cognizance of the fact that the appointment was admittedly sought for the sole purpose of creating diversity.[19]

Both *Lester* and *McSparran* advocate the use of a subjective test in determining whether actual diversity exists.[20] In applying such a test, however, the federal courts would have to determine the intent of the party or parties who sought to have an out-of-state executor or administrator appointed. "While purporting to abolish the 'manufacture' of diversity jurisdiction, [a subjective test] would elevate such manufacturing to an art difficult to define and even more difficult to combat." [21] The citizenship of the beneficiary or decedent, rather than the personal representative, should be the test of diversity.[22] This pro-

PRACTICE ¶ 17.05, at 165 (2d ed. 1968). Moore states that "[t]he intent of 28 USC § 1359 has been negated in cases allowing the manufacture of diversity by the appointment of representatives. The fact that full disclosure of the motivation is made to both the appointing state court and the federal court should not save the appointment from being 'improper' within § 1359." *See* McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968). The court felt that possible collusion could not be overlooked simply because the guardian was procedurally the real party in interest. *See generally* Martineau v. City of St. Paul, 172 F.2d 777 (8th Cir. 1949).

[19] McSparran v. Weist, 402 F.2d 867 (3d Cir. 1968). "Whether in an individual case diversity jurisdiction is 'manufactured' is, of course, a question of fact. Here 'manufactured' diversity [was] conceded, but in other cases where it is not conceded it will be for the district court to make the factual determination." *Id.* at 876. The factual determination of which the court speaks is equated with the examination of motive. *Accord*, Gilchrist v. Strong, 299 F. Supp. 804 (W.D. Okla. 1969) (administrator); Ferrara v. Philadelphia Labs., Inc., 272 F. Supp. 1000 (D. Vt. 1967) (transfer of cause of action).

[20] The mere examination of motive by the federal court makes the test a subjective one. It had been objective in that the federal courts had not looked beyond the state appointment.

"It is unnecessary here to review the history of the problem [manufactured diversity] or the general reasons which lead us to our conclusion for they are fully developed in *McSparran*. We adopt the reasoning of the majority opinion . . . in that case." Lester v. McFaddon, 415 F.2d 1101, 1104 (4th Cir. 1969).

[21] Esposito v. Emery, 402 F.2d 878, 882 (3d Cir. 1968) (dissent by Biggs, J.).

[22] A.L.I.: STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, pt. I, Proposed § 1301(b)(4) (Official Draft 1965). The appointment of a nonresident representative is quite common. The institute's detailed study indicated that of all the diversity cases filed in Pennsylvania during 1958 and 1959, 20.5% of them were brought by out-of-state personal representatives of Pennsylvania citizens against Pennsylvania defendants. *See* Currie, *The Federal Courts and the American Law Institute*, 36 U. CHI. L. REV. 1 (1968).

posal would create an objective rule, independent of the motivation of the parties, and would result in the elimination of manufactured diversity suits, thereby significantly reducing the federal court dockets. An objective test would, however, deny diversity jurisdiction when the appointment of an out-of-state administrator was sought in good faith.[23] Nevertheless, the traditional explanation for the creation of diversity of citizenship, that being fear of local prejudice against out-of-state litigants, is no longer tenable.[24] There is today no more protection afforded a party in a federal than a state court, so the nonresident representative would not be prejudiced by seeking his remedy in a state court.

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[23] *See* 3A J. MOORE, FEDERAL PRACTICE ¶ 17.05, at 166 (2d ed. 1968).

[24] *See* Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 510 (1928). *See generally* Summers, *Analysis of Factors That Influence Choice of Forum in Diversity Cases*, 47 IOWA L. REV. 933 (1962).

Divorce—SEPARATION WITHOUT FAULT—POST-NUPTIAL INSANITY—*Crittenden v. Crittenden*

Divorce in this country is based solely on statutory grounds.[1] In keeping with the common law doctrine of recrimination,[2] divorce was originally granted only to the spouse who was without fault.[3] Today, however, there is a trend toward liberalization in the policy underlying divorce law,[4] and over one-half of the states recognize living "separate and apart" as a ground for divorce.[5]

In *Crittenden v. Crittenden*[6] the unqualified requirement of living "separate and apart" was construed in a factual context in which the direct cause of the marital separation was the insanity of the wife. The parties had lived together as husband and wife until the date of the wife's commitment to a state hospital for mental incompetence.[7] Since the separation resulted from her commitment, the wife was held to be incapable, as a matter of law, of being conscious of the fact that a separation had occurred.[8] Therefore, in order for the living "separate

[1] *See* Dennis v. Dennis, 68 Conn. 186, 36 A. 34 (1896); Otis v. Bahan, 209 La. 1082, 26 So. 2d 146 (1946); Cunningham v. Cunningham, 187 Mich. 68, 153 N.W. 8 (1915); Kasal v. Kasal, 227 Minn. 529, 35 N.W.2d 745 (1949); Pretlow v. Pretlow, 177 Va. 524, 14 S.E.2d 381 (1941); Huff v. Huff, 73 W.Va. 330, 80 S.E. 846 (1914).

[2] "Recrimination is the outrageous legal principle which ordains that when both spouses have grounds for divorce, neither may have a decree." H. CLARK, LAW OF DOMESTIC RELATIONS § 12.12 (1968). *See generally* Beamer, *Recrimination in Divorce Proceedings*, 10 KAN. CITY L. REV. 213 (1942).

[3] *See, e.g.*, Riesland v. Riesland, 186 Ore. 227, 206 P.2d 96 (1949); Brewies v. Brewies, 27 Tenn. App. 68, 178 S.W.2d 84 (1943); McFarland v. McFarland, 179 Va. 418, 19 S.E.2d 77 (1942).

[4] Within the past decade Alabama, Colorado, Virginia, and Delaware have enacted legislation making living "separate and apart" a ground for divorce.

[5] The following statute is representative:

> A divorce from the bond of matrimony may be decreed:
>
> (9) On the application of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for two years. A plea of res ajudicata or of recrimination with respect to any other provision of this section shall not be a bar to either party obtaining a divorce on this ground. VA. CODE ANN. § 20-91(9) (Cum. Supp. 1968).

For a catalog of jurisdictions with similar statutes, *see* AM. JUR. 2d DESK BOOK, Doc. No. 125 (1969 Cum. Supp.). For a discussion of this type of statute, *see* Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966). *See also* 1 U. RICH. LAW NOTES 330 (1962).

[6] 210 Va. 76, 168 S.E.2d 115 (1969).

[7] The parties were married in 1941. The defendant was committed in May, 1950. The parties have lived separate and apart from that time, and plaintiff initiated his divorce suit in February, 1967.

[8] The court felt this conclusion to be inescapable, but its reasoning therefor is not

and apart" to be within the meaning of the statutory language, both spouses must be of such mental competence as to be conscious of the fact that a separation has occurred.

When living "separate and apart" is construed as requiring a voluntary act by both parties, insanity is clearly a bar to a suit for divorce on that ground.[9] The same result is obtained by an interpretation that the spouses must live separate and apart because of their mutual purpose to do so, or because one party so determined and the other acquiesced.[10] Living "separate and apart" has been construed as requiring a voluntary act of the spouses only at the inception of the separation, in which case the subsequent insanity of one party during the running of the statutory period does not bar a divorce.[11] When the plain language of the living "separate and apart" requirement is left unencumbered by judicial qualification, however, and when its terms are given effect, then insanity, even at the inception of the separation, will not bar a subsequent divorce.[12] Such a result is both in harmony with the stated purpose of the statutory language,[13] and in keeping with the liberal construction given to remedial statutes.[14]

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clear from the opinion. Crittenden v. Crittenden, 210 Va. 76, 78, 168 S.E.2d 115, 116 (1969). Certainly an insane spouse may be quite capable, as a matter of fact, of being conscious of a separation from her marital partner.

Not only is insanity not a ground for divorce in Virginia, but it also is a bar to any divorce suit based on fault. Therefore, the plaintiff in *Crittenden* can obtain no relief from his marital dilemma in Virginia courts.

The question presented in *Crittenden* is not limited to jurisdictions, such as Virginia, which recognize the divorce ground of living "separate and apart," but do not grant divorce on the ground of insanity. In jurisdictions which grant divorce on both grounds, the sane spouse may desire to take advantage of a shorter statutory time requirement for living "separate and apart." Knabe v. Berman, 234 Ala. 433, 175 So. 354 (1937). In addition, proof of insanity may involve difficult evidentiary problems not present in proof of living "separate and apart."

[9] *See* Wilder v. Wilder, 207 Ark. 414, 181 S.W.2d 17 (1944); Carlson v. Carlson, 198 Ark. 231, 128 S.W.2d 242 (1939).

[10] *See* Messick v. Messick, 177 Ky. 337, 197 S.W. 792 (1917); Ferguson v. Ferguson, 8 Ky. L. Rptr. 428 (1886) (abstract).

[11] Vincent v. Le Doux, 146 La. 144, 83 So. 439 (1919). The statute required that the spouses live separate and apart for seven years. The wife was committed three years after the commencement of the separation. At the end of the statutory period the plaintiff was granted a divorce.

[12] Knabe v. Berman, 234 Ala. 433, 175 So. 354 (1937). The court acknowledged that insanity would bar a divorce on any ground which required a voluntary act, but then observed that the statute contained no such qualification: "So that it can have no effect on her [plaintiff's] rights in this respect whether he is sane or insane, if its terms are given effect." *Id.* at 434, 175 So. at 355.

[13] "The object [of the statute] is to put an end to a situation of the parties which is barren of good, capable of evil, and probably irremediable by any other means."

The living "separate and apart" provision is not grounded on the fault of either party.[15] In many instances the admittedly guilty party, in terms of the traditional fault approach to divorce, has taken advantage of this divorce provision in order to liberate himself from an unwanted marital relationship.[16] The avowed purpose of the statutory language is to put an end in law to marriages which have ceased in fact.[17] This purpose is as applicable, if not more so, to a marriage which has in fact been terminated by the insanity of one of the spouses.

The reluctance of the courts to apply the living "separate and apart" provisions to separations caused by insanity cannot be explained on a basis of public policy.[18] Six years before *Crittenden* the intervening insanity of a deserting spouse was held not to be a bar to a divorce.[19] Nor can the court's reluctance be based on the fear that the insane spouse will become a financial charge on the state if the marital ties are dissolved. The *Crittenden* court had the express authority to provide for the maintenance of the insane spouse.[20]

Barrington v. Barrington, 206 Ala. 192, 193, 89 So. 512, 513 (1921).

[14] *See generally* Sachs v. Ohio Nat'l Ins. Co., 131 F.2d 134 (7th Cir. 1942); Ayers v. Parker, 15 F. Supp. 447 (D. Md. 1936); State *ex rel.* Cooper v. Coleman, 138 Fla. 520, 189 So. 691 (1939); Zehender & Factor, Inc. v. Murphy, 386 Ill. 258, 53 N.E.2d 944 (1944); State v. Pullen, 58 R.I. 294, 192 A. 473 (1937); City of Mason v. West Texas Util. Co., 150 Tex. 18, 237 S.W.2d 273 (1951); Findlay v. National Union Indem. Co., 85 Utah 110, 38 P.2d 760 (1934).

[15] *See* Clark v. Clark, 21 Ky. L. Rptr. 955, 53 S.W. 644 (1899); Matysek v. Matysek, 212 Md. 44, 128 A.2d 627 (1957); Spray v. Spray, 368 S.W.2d 159 (Tex. Civ. App. 1963); Hagen v. Hagen, 205 Va. 791, 139 S.E.2d 821 (1965); Canavos v. Canavos, 205 Va. 744, 139 S.E.2d 825 (1965).

[16] *See, e.g.*, Goudeau v. Goudeau, 146 La. 742, 84 So. 39 (1920); Matysek v. Matysek, 212 Md. 44, 128 A.2d 627 (1957); Fields v. Fields, 399 S.W.2d 958 (Tex. Civ. App. 1966); Robertson v. Robertson, 217 S.W.2d 132 (Tex. Civ. App. 1949); Hagen v. Hagen, 205 Va. 791, 139 S.E.2d 821 (1965). The Virginia statute specifically provides that fault will not bar a divorce. VA. CODE ANN. § 20-91(9) (Cum. Supp. 1968). *See* text p. 347 and note *5 supra.*

[17] *See* Canavos v. Canavos, 205 Va. 744, 139 S.E.2d 825 (1965). *See also* Barrington v. Barrington, 206 Ala. 192, 89 So. 512 (1921); Otis v. Bahan, 209 La. 1082, 26 So. 2d 146 (1946); George v. George, 56 Nev. 12, 41 P.2d 1059 (1935); Dawson v. Dawson, 62 Wyo. 519, 177 P.2d 200 (1947).

[18] The *Crittenden* court has applied the statutory provision which directs that insanity commencing after desertion shall not be a bar to a divorce suit based on desertion. VA. CODE ANN. § 20-93 (1960). If this principle is extended, the living "separate and apart" statutory provision should be applicable when the insanity commences after the separation. *See text* p. 348 and note 11 *supra.*

[19] Pollard v. Pollard, 204 Va. 316, 130 S.E.2d 425 (1963). The defendant was adjudged insane twenty-nine days after deserting her husband. The court applied VA. CODE ANN. § 20-93 (1960), and awarded the plaintiff a divorce after the desertion had continued for one year.

[20] In decreeing the divorce, the court has the authority to enter such further orders

One spouse may not be prevented by the other from obtaining a divorce under the living "separate and apart" provision,[21] regardless of the fault of either party.[22] A guilty spouse may obtain relief in every case, except in the situation where insanity results. As a result of *Crittenden*, however, the remedy of the innocent marital partner of an insane spouse is limited to either death or a judicious change of domicil.[23]

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as it deems expedient concerning the maintenance of the parties. VA. CODE ANN. § 20-107 (Cum. Supp. 1968). In *Crittenden* the plaintiff had, prior to the initiation of the divorce suit, established a trust fund to provide for the support of the defendant.

[21] Hagen v. Hagen, 205 Va. 791, 139 S.E.2d 821 (1965).

[22] *See* Canavos v. Canavos, 205 Va. 744, 139 S.E.2d 825 (1965).

[23] The remedy of the spouse whose legal position is the same as that of the plaintiff in *Crittenden* lies with the Virginia legislature. *See* note 1 *supra*. To this end H.B. 13 was enacted into law during the 1970 session of the Virginia General Assembly. H.B. 13 specifically provides that insanity of either party is not a bar to divorce under VA. CODE ANN. § 20-91(9) (Cum. Supp. 1968), regardless of the date of the commencement of the insanity. H.B. 13 is both prospective and retrospective, and will have the practical effect of legislatively reversing *Crittenden*.

Some Aspects of Abortion Constitutionality—*People v. Belous*

The early common law imparted human status to an animated but unborn child at the quickening stage[1] by holding its abortion to be a homicide.[2] By the mid-seventeenth century, however, the crime had been relegated to the status of a grave misdemeanor.[3] Prior to the quick stage, the act was no crime if the woman's consent was obtained, and was merely a battery in the absence of consent.[4] Similarly, the common law as adopted in the first American jurisdictions allowed abortion until approximately the eighteenth week of pregnancy,[5] but punished it at any later stage as a serious misdemeanor.

American dissatisfaction with the quickening distinction was one factor leading to the enactment of penal abortion statutes,[6] almost every jurisdiction prohibiting abortion at any stage of pregnancy, ex-

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[1] *See, e.g.*, Commonwealth v. Parker, 50 Mass. (9 Met.) 263, 266, 43 Am. Dec. 396, 397 (1845); State v. Cooper, 22 N.J.L. 52, 54, 51 Am. Dec. 248, 249 (Sup. Ct. 1849); 1 W. BLACKSTONE, COMMENTARIES * 129 ("Life . . . begins in contemplation of law as soon as an infant is able to stir in the mother's womb.")

If a pregnant woman were sentenced to death for a crime, a plea in stay of execution would lie if the child had quickened in the womb, but not otherwise. State v. Cooper, 22 N.J.L. 52, 57, 51 Am. Dec. 248, 252 (Sup. Ct. 1849); 4 W. BLACKSTONE, COMMENTARIES * 395.

[2] *See, e.g.*, State v. Cooper, 22 N.J.L. 52, 54, 51 Am. Dec. 248, 250 (Sup. Ct. 1849); Evans v. People, 49 N.Y. 86, 88 (1872). *Contra,* Mitchell v. Commonwealth, 78 Ky. 204, 210, 39 Am. Rep. 227, 231 (1879).

[3] "For, if a woman is quick with child, and, by a potion or otherwise, killeth it in her womb; or, if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child, this, though not murder, was, by the ancient law, homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor." 1 W. BLACKSTONE, COMMENTARIES * 129; 3 E. COKE, INSTITUTES * 50.

[4] *See, e.g.*, State v. Alcorn, 7 Idaho 599, 64 P. 1014 (1901); Mitchell v. Commonwealth, 78 Ky. 204, 210, 39 Am. Rep. 227, 231 (1879); Smith v. State, 33 Me. 48, 54 Am. Dec. 607, 609 (1851); Commonwealth v. Bangs, 9 Mass. 386, 387 (1812); Commonwealth v. Parker, 50 Mass. (9 Met.) 263, 265-66, 43 Am. Dec. 396, 397 (1845); State v. Cooper, 22 N.J.L. 52, 58, 51 Am. Dec. 248, 253 (Sup. Ct. 1849); Miller v. Bennett, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949). *But see* State v. Reed, 45 Ark. 333, 334 (1885); State v. Slagle, 83 N.C. 630, 632 (1880); Mills v. Commonwealth, 13 Pa. 630, 632 (Sup. Ct. 1850).

[5] "Quickening" is defined by medico-legal dictionaries as a stage of pregnancy at which movement of the fetus is first felt by the mother, occurring between the sixteenth and twentieth weeks. 2 J. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE 667 (1962); B. MALOY, MEDICAL DICTIONARY FOR LAWYERS, 598 (3d ed. 1960).

[6] *See generally* Mills v. Commonwealth, 13 Pa. 630, 632 (Sup. Ct. 1850).

cept when done to save the life of the pregnant woman.[7] Although the common law offense was intended to protect the unborn child instead of the mother,[8] the American statutes indicate an intent to protect both of them,[9] as well as to uphold the rights of society.[10]

California's highest court recently tested the constitutionality of abortion under standards prescribed by recent United States Supreme Court decisions, and concluded that the California abortion statute abridged the rights of the pregnant citizen without sufficient justification. *People v. Belous*[11] reversed the statutory abortion conviction of an eminent physician who referred an unmarried patient to a California abortionist after she had threatened to obtain a potentially dangerous abortion in Mexico. The court held the statute[12] void because the essential term "necessary to preserve" had no commonly accepted meaning[13] consistent with legislative intent[14] that did not unduly in-

[7] Current statutes are collected in Lucas, *Federal Constitutional Limitations on the Enforcement and Administration of State Abortion Statutes,* 46 N.C. L. REV. 730, 734 (1968); Sands, *The Therapeutic Abortion Act: An Answer to the Opposition,* 13 U.C.L.A. L. REV. 285, 310 (1966) (Appendix B).

[8] Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 699 (1967) (concurring opinion); State v. Siciliano, 21 N.J. 249, 121 A.2d 490, 495 (1956); State v. Cooper, 22 N.J.L. 52, 54, 51 Am. Dec. 248, 250 (Sup. Ct. 1849).

[9] People v. Gallardo, 243 P.2d 532, 536 (Cal. Dist. Ct. 1952), *modified,* 41 Cal. 2d 57, 257 P.2d 29 (Sup. Ct. 1953); State v. Siciliano, 21 N.J. 249, 121 A.2d 490, 495 (1956); State v. Murphy, 27 N.J.L. 112, 114 (Sup. Ct. 1858).

North Carolina enacted two statutes, one applicable at all stages of pregnancy and designed for the protection of the mother, and another appplicable only after the quickening stage is reached, designed to protect only the unborn child. State v. Hoover, 252 N.C. 133, 113 S.E.2d 281, 283 (1960); State v. Jordan, 227 N.C. 579, 42 S.E.2d 674, 675 (1947).

Virginia's high court has expressly declared that the intention of the lawmakers was to protect the health and lives of pregnant women and their unborn children from those who intentionally and mala fidely would thwart nature by performing or causing abortion and miscarriage. Anderson v. Commonwealth, 190 Va. 665, 673, 58 S.E.2d 72, 75 (1950).

[10] *See generally* People v. Gallardo, 243 P.2d 532, 536 (Cal. Dist. Ct. 1952), *modified,* 41 Cal. 2d, 57, 257 P.2d 29 (Sup. Ct. 1953) ("designed to stay the activities of meddling agencies bent upon disrupting the process of racial reproduction"); Miller v. Bennett, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949) ("unnecessary interruption of pregnancy is universally regarded as highly offensive to public morals and contrary to public interest.").

[11] 71 Cal. 2d 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied,* 38 U.S.L.W. 3313 (Feb. 24, 1970).

[12] CAL. PEN. CODE § 274 (West 1955).

[13] "Dictionary definitions and judicial interpretations fail to provide a clear meaning for the words, 'necessary' or 'preserve.' There is, of course, no standard definition of 'necessary to preserve,' and taking the words separately, no clear meaning emerges." People v. Belous, 71 Cal. 2d 996, 458 P.2d 194, 198, 80 Cal. Rptr. 354, 358 (1969).

fringe upon the rights of the woman to live and to choose whether to bear children, and because it violated due process of law by delegating to the physician the responsibility of determining whether to perform the abortion.[15] In so doing, the court seemingly accorded a superior status to the rights of the expectant mother, although the pregnancy itself did not endanger her life, and relegated the rights of the unborn child and of society to a position of uncertainty.

The term "necessary to preserve" is included in the abortion statutes of many jurisdictions,[16] and has been interpreted by an intermediate California appellate court to require the existence of a potentially dangerous situation constituting a threat to the patient's life in order to justify an abortion performed to remove the danger.[17] Other courts have reached similar conclusions in the few reported decisions available in which the phrase was discussed,[18] but apparently most courts have found no ambiguity in the statutes employing the same language. To the dissenting justices in *Belous*, the majority transform by lavish analysis "that which is simple and lucid into something complex and arcane." [19]

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[14] The legislature's intent as construed in earlier decisions did not require certainty or immediacy of death before an abortion could be performed, but only that the dangerous condition be potentially present. People v. Ballard, 167 Cal. App. 2d 803, 814, 335 P.2d 204, 212 (Dist. Ct. 1959).

[15] The court found that due process was violated because the doctor was motivated by the threat of penal sanction to refuse an abortion, and thus had a "direct, personal, substantial, pecuniary interest in reaching a conclusion that the woman should not have an abortion." People v. Belous, 71 Cal. 2d 996, 458 P.2d 194, 206, 80 Cal. Rptr. 354, 366 (1969). Cited to support this conclusion were Tumey v. Ohio, 273 U.S. 510 (1927), holding that a system of judges' compensation in criminal cases which resulted in greater pay upon rendition of a guilty judgment as compared with a finding of not guilty violated due process, and State Board of Dry Cleaners v. Thrift-O-Lux Cleaners, 40 Cal. 2d. 436, 254 P.2d 29 (1953), prohibiting legislative delegation to an administrative board of the authority to set and enforce minimum charges for dry cleaning without the establishment of an ascertainable standard to guide the board.

[16] *See, e.g.*, N.Y. PENAL CODE § 125.05(3) (McKinney 1967); OHIO REV. CODE ANN. § 2901.16 (Baldwin 1964); D.C. CODE § 22-201 (1967) ("necessary for the preservation of the mother's life or health"); KY. REV. STAT. § 436.020 (Baldwin, 1969).

[17] People v. Ballard, 167 Cal. App. 2d 803, 814, 335 P.2d 204, 212 (Dist. Ct. 1959); People v. Abarbanel, 239 Cal. App. 2d 31, 48 Cal. Rptr. 336 (Dist. Ct. 1965).

[18] *See, e.g.*, State v. Jones, 20 Del. 109, 53 A. 858, 859 (1902); Beasley v. People, 89 Ill. 571, 577 (1878); Willey v. State, 46 Ind. 363, 367 (1874); Bassett v. State, 41 Ind. 303, 304 (1872); State v. Dunklebarger, 206 Iowa 971, 221 N.W. 592, 596 (1928); Commonwealth v. Wheeler, 315 Mass. 394, 53 N.E.2d 4 (1944).

[19] People v. Belous, 71 Cal. 2d 996, 458 P.2d 194, 211, 80 Cal. Rptr. 354, 371 (1969) (dissenting opinion). One dissenting justice reasoned that since the phrase "necessary to preserve" had been included in the statute for over one hundred years, and

Of far greater significance, however, to the future of legislative abortion prohibition is the court's pronouncement of the woman's right to choose, after conception, whether to bear the child or to terminate her pregnancy. The court derived this constitutional right from the widely noted Supreme Court decision in *Griswold v. Connecticut*.[20] *Griswold* found a right of privacy protected by the Bill of Rights, but failed to delineate its scope, and thus the extent to which it could transgress upon, and thereby limit, a state's exercise of its police power. This "zone of privacy" was found by *Belous* to be sufficiently broad to override the state's interest in protection of the unborn and of society's rights, indicating that the right of privacy may be far broader in scope than was needed to sustain the *Griswold* decision.

Belous reasoned that the mother's right to life was involved because medical statistics indicate that an early abortion, properly performed, is less dangerous than childbirth,[21] and because a criminal abortion, to which the pregnant woman might resort if denied a legal operation, presents a grave danger to her life.[22] The court did not consider that the unborn child could assert any rights superior to the mother's right to life, and concededly, this rationale is the basis of the exception pro-

had been continuously interpreted by doctors, hospital committees, judges, lawyers, and juries during the entire period, for the court to find the language vague was a "negation of experience and common sense." *Id.* at 458 P.2d 207, 80 Cal. Rptr. 367 (dissenting opinion). Justice Sullivan declared that "One would think that the English language which has been the sensitive instrument of our system of law for over 500 years, has lost, by the mere passage of time, all capacity for clarity of expression." *Id.* at 458 P.2d 210, 80 Cal. Rptr. 370 (dissenting opinion).

[20] 381 U.S. 479, 482 (1965), holding unconstitutional a Connecticut statute prohibiting the use of contraceptives and the dissemination of birth control information, because it ". . . operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation," and thereby extended beyond what was necessary to accomplish the desired goal, *i.e.*, the scope of the statute exceeded the evil sought to be prevented.

[21] The court's statistics do not conclusively support this allegation because the number of abortions reported was insufficient to allow a proper sample. The court cited a rate of 291 deaths per million births, compared with no deaths in 3,775 abortions performed in California under the new Therapeutic Abortion Act of 1967. Yet based upon the United States rate only one death would be expected in 3,775 births; thus, the abortion experience is yet too insufficient to project the rate of deaths from abortions. People v. Belous, 71 Cal.2d 996 n.6 & n.7, 458 P.2d 194, 199 n.6, 201 n.7, 80 Cal. Rptr. 354, 359 n.6, 361 n.7 (1969).

[22] Actually the number of deaths attributable to illicit abortions is unknown, but a 1936 study indicated a probability of 5,000 to 10,000 annually in the United States, as an educated guess. Niswander, *Medical Abortion Practice in the United States*, 17 WEST. RES. L. REV. 403, 404 (1965). Due to the availability of professional medical treatment if complications arise, undoubtedly there are fewer deaths today even though the total number of abortions performed is greater.

vided in most abortion statutes allowing an abortion to save the mother's life. However, to apply it to a situation in which the danger to the mother is de minimis contravenes the law's trend toward greater protection for the unborn child in the criminal,[23] tort,[24] and property[25] areas.

The Virginia abortion statute does not use the term "necessary to preserve," although it incorporates a subjective exception in similar language,[26] and therefore, it is not susceptible to the same vagueness challenge as California's statute. Virginia's position on the rights of the unborn child[27] would likely incline the Supreme Court of Appeals

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[23] The criminal law has historically required that a child be born alive before it can become an object of murder. Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923); People v. Ryan, 9 Ill. 2d 467, 138 N.E.2d 516 (1956). However, the California Superior Court recently upheld the validity of an indictment charging the murder of an eight-month old fetus which was born dead. Keeler v. Superior Ct. 276 Cal. App. 324, 80 Cal. Rptr. 865 (1969).

[24] At common law, there could be no recovery on behalf of an infant, after birth, for a negligently inflicted pre-natal injury. Dietrich v. Northampton, 138 Mass. 14 (1884). *But see* Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946), allowing recovery based on common law principles. Since then, a number of jurisdictions have either overruled former decisions, or ruled for the first time, and allowed recovery by the child for pre-natal injuries. Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960); Woods v. Lancet, 303 N.Y. 349, 102 N.E.2d 691 (Ct. App. 1951); Sinkler v. Kneale, 401 Pa. 262, 164 A.2d 93 (1960). Smith v. Brennan, *supra*, allowed recovery although viability at the time of the injury was not alleged. Most decisions, however, require viability, and reject actions for injuries occurring before viability. Many decisions allow recovery by the personal representative of a still-born infant for the wrongful death of the child due to pre-natal injury after viability. Gorke v. Le Clerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); Stidam v. Ashmore, 109 Ohio App. 431, 167 N.E.2d 106 (1959). *Contra,* Keyes v. Construction Serv., Inc., 340 Mass. 633, 165 N.E.2d 912 (1960); Graf v. Taggert, 43 N.J. 303, 204 A.2d 140 (1964); Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969).

[25] A 1965 English decision upset precedent by allowing a contingent remainder to vest in the unborn child at the death of his parent, although it had been an ironclad rule that a contingent remainder would fail if it could not vest prior to the termination of the preceding estate in an ascertainable person, eliminating the unborn. Reeve v. Long, 83 Eng. Rep. 754 (1695). American decisions similarly protected the property rights of the unborn. Hall v. Hancock, 32 Mass. 255 (1834) allowed an unborn child to take a legacy in favor of children living at the death of the testator, and Barnett v. Pinkston, 238 Ala. 327, 191 So. 371 (1939) allowed a child, after birth, to take a legacy by way of remainder to children living at the death of the life tenant, his father, who died two months prior to the child's birth.

[26] "No person, by reason of any act mentioned in this section, shall be punishable when such act is done in good faith, with the intention of saving the life of such woman or child." VA. CODE ANN. § 18.1-62 (1960).

[27] Miller v. Bennett, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949) expressly stated that the statute was enacted ". . . not for the protection of the woman, but for the protection of the unborn child and through it society."

to turn a deaf ear to an argument which negated those rights, although the Virginia court has expressly recognized that the abortion statute was designed in part to protect the health and lives of pregnant women,[28] and has also stated that the offense is against the mother as well as the child.[29]

The third ground of unconstitutionality found in *Belous*, that of delegation of legislative authority to the doctor,[30] has not been considered by the Virginia court. However, since the Virginia statute expressly excludes from its scope those operations performed in good faith,[31] it would seem that a Virginia physician is not subjected to the same sanction as is a California physician, since in Virginia subjective good faith is an affirmative defense even though in fact the abortion was not necessary to preserve the life of the patient. The Virginia physician, therefore, can render a less partial decision without fear of criminal sanction.

In view of the *Belous* holding, it may be expedient for other state legislatures to consider abortion law reform, possibly as suggested by the Model Penal Code,[32] which has been adopted with minor modifications in several jurisdictions.[33] This recommended legislation relaxes the strict prohibition present in most statutes, and allows abortion in cases of rape or incest which result in pregnancy,[34] as well as in pregnancies

[28] Anderson v. Commonwealth, 190 Va. 665, 673, 58 S.E.2d 72, 75 (1950).

[29] *Id.*

[30] *See* note 15 *supra.*

[31] VA. CODE ANN. § 18.1-62 (1960).

[32] MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962); MODEL PENAL CODE § 207.11 (Tent. Draft No. 9, 1959).

The Virginia Advisory Legislative Council recently completed a study of Virginia's abortion law, concluding that abortion should be permitted: "(1) where the continuation of pregnancy is likely to result in the death of the mother or impair her physical or mental health; (2) where there is substantial medical likelihood that the child would be born with an irremedial mental or physical defect, or (3) where the pregnancy resulted from rape, where the parties have not been thereafter married, or incest." The Council concluded that the determination of impairment of the mother's physical or mental health should be made solely by the medical profession, because it was primarily a medical question. It recommended amendments to the current statute to conform to these suggestions. VALC, VIRGINIA'S ABORTION LAWS 1969.

[33] Since 1967, California, Colorado and North Carolina have enacted abortion statutes based upon the MODEL PENAL CODE.

[34] Also included are cases of felonious intercourse, defined as illicit intercourse with a female under sixteen. MODEL PENAL CODE § 230.3(2) (Proposed Official Draft, 1962).

As enacted by California, the measure includes a provision to deter unfounded claims of rape or incest. The therapeutic abortion committee, which receives the ap-

which would likely result in birth of a seriously defective child, either physically or mentally.[35] Abortion is also allowed when the continuation of the pregnancy would seriously threaten the mother's physical or mental health.[36] The proposal requires that the decision to abort be made by at least two physicians.[37] Whether it expands the rights of a woman to obtain an abortion sufficiently to satisfy the *Belous* objections is a question which must await future litigation.

It is likely that the *Belous* decision will inspire attacks upon other abortion statutes in many jurisdictions.[38] Hopefully, such tribunals as may consider the issues will refrain from the abrogation of legislative enactments of long-standing on the basis of questionable constitutional interpretations. If the majority of public opinion is in favor of a relaxed abortion prohibition, its argument should be addressed to the legislatures.[39] Clearly, the usurpation of legislative prerogative by the judiciary threatens our delicate system of checks and balances. The Constitution is too inviolate a document to be distorted by tortured construction on the altars of social change.[40]

C.K.T.

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plication for an abortion based upon grounds of rape or incest, must request the approval of the district attorney of the jurisdiction wherein the alleged crime occurred. If he fails to find probable cause that the crime took place, he can refuse permission. Leavy and Charles, *California's New Therapeutic Abortion Act: An Analysis and Guide to Medical and Legal Procedure*, 15 U.C.L.A. L. REV. 1 (1967).

35 MODEL PENAL CODE § 230.3(2) (Proposed Official Draft, 1962).

36 *Id.*

37 MODEL PENAL CODE § 230.3(3) (Proposed Official Draft, 1962).

38 Recently, the abortion statute of the District of Columbia was declared unconstitutional. United States v. Vuitch, 305 F. Supp. 1032 (D.D.C. 1969). The Virginia Advisory Legislative Council recognized in its report on abortion laws that the United States Supreme Court is almost certain to rule on the constitutionality of similar state laws on abortion in view of the *Vuitch* decision. VALC, VIRGINIA'S ABORTION LAWS (1969).

39 Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689, 698-99 (1967) (concurring opinion) declared: "Our duty in this highly charged public policy area is to say what the law is and not what we think it ought to be. What it ought to be is a matter for the legislative branch of the government . . . . If it is not as responsive as the people believe contemporary life demands, the remedy rests with them and not with the courts."

40 A New York court, in reviewing the constitutionality of a statute regulating dissemination of contraceptive devices, declared: "The attorney . . . in the final analysis . . . is still asking this Court to enact new law rather than to interpret the laws on the books. It is apparent that the defendant is basing his contentions upon the social aspects, rather than the legal ones, but the Court cannot do what only the Legislature can do—consider these changed social attitudes as justification to, in effect, repeal a statute. Certainly no Judge is equipped to appraise changes in social attitudes." People v. Baird, 47 Misc. 2d 478, 262 N.Y.S.2d 947 (Dist. Ct. 1965).