Senator BAUCUS. Yes, that was the comment I was going to make. It is possible that the error was made by the author of the memorandum.

Dr. GERSTER. I would hope that is true. I was a little disturbed by the first few questions regarding the lack of memory of the vote, those two votes, in so radical a bill. We have no choice but to accept that but it is astounding that that could be forgotten.

Senator BAUCUS. Well, I must say in the short time I have been in the Senate, I would be hard pressed to remember some of the votes that I have cast in the past year or two. Thank you very much for your testimony.

Dr. GERSTER. Thank you.

Senator BAUCUS. Thank you, Mr. Chairman.

The CHAIRMAN. We have a witness who has to catch a plane right away. Dr. Willke and Dr. Gerster, would you mind keeping your seats, and we shall bring the other witness up for a minute or two?

The Honorable Joan Dempsey Klein, would you come forward. We understand you are with the National Association of Women Judges, and I understand you have to catch a plane right away.

Would you hold up your hand and be sworn?

Do you swear that the evidence you give shall be the truth, the whole truth, and nothing but the truth, so help you God?

Judge KLEIN. I do.

The CHAIRMAN. Have a seat, and you may proceed for 5 minutes.

TESTIMONY OF HON. JOAN DEMPSEY KLEIN, PRESIDING JUSTICE, CALIFORNIA COURT OF APPEALS, AND PRESIDENT, NATIONAL ASSOCIATION OF WOMEN JUDGES

Judge KLEIN. Thank you.

I understand my comments in their entirety will be made a part of the record, and so I shall summarize my remarks before this honorable committee.

The CHAIRMAN. Without objection, that will be done.

Judge KLEIN. Thank you.

It is with extreme pleasure that I appear before this committee to speak on behalf of the confirmation of the first woman nominee to the Supreme Court. I am before you in my capacity as president of the National Association of Women Judges, which is an association with which over half of the Nation's Federal and State female judges have affiliated, along with a number of male judges.

The purposes of the association include the discussion of legal, educational, social, and ethical problems mutually encountered by Women Judges and the formulation of solutions, and of course, efforts to increase the number of women judges so that the judiciary more appropriately reflects the role of women in a democratic society.

As you might well imagine, the appointment of a woman to assume a place on the highest court has had top priority on our agenda. It seems to have been such a long time coming but, when considered in a historical perspective, perhaps the 191 years is an understandable period of time.

The legal roots of this Nation are in the English common law, which law classified women in the same category as chattels, chil-

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dren, and incompetents. As a consequence, women's activities outside the home were extremely restricted, including the opportunity to gain an education.

Even so, the now-famous lady, Myra Bradwell, qualified herself to practice law but denying her the right to do so, the Supreme Court in 1873 said, "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."

From the beginning, women have had to wage a constant struggle to participate in that civil life. A constitutional amendment was required just 61 years ago to allow women to engage in the most basic and sacred right in a democracy, the right to vote, and although adopted in 1868, the much-heralded clause in the 14th amendment guaranteeing all persons the equal protection of the law did not protect women from laws that discriminate on the basis of sex. As you have been advised and know, of course, it was not until 1971 that the Supreme Court for the first time declared unconstitutional a blatantly sexually discriminatory State law because it violated the 14th amendment.

Societal changes in the lives of American women have come about slowly but surely. Compared to our mean beginnings, the changes are of staggering proportion. Women now constitute over 42 percent of the Nation's work force and over 50 percent of all women are gainfully employed outside the home. Women are seeking professional training in law and are participating in political decisionmaking in ever-increasing numbers. Today's factual knowledge of women indicates that indeed they are engaged in all aspects of civil life.

However, as timely as we consider this appointment to be and as eager as we are to have such an appointment become a reality, we are emphatic that the woman selected be of the highest caliber. By virtue of the fact that so many of us have been the "first woman judge" or the "only woman judge" in any number of situations, we are keenly aware of the spotlight focused on our every act and the scrutiny to which we are continually subjected. Such attention will be greatly magnified in the case of the first woman Justice on the Supreme Court. Her performance will reflect on all of us lesser judicial luminaries, and we want to be assured that she has the capacity to succeed.

For these reasons and more, I am pleased to report that the national association finds the nominee to be exceptionally well qualified. Certain of our members participated in an evaluation of her and made the customary inquiries relating to professional competency, judicial temperament, and integrity. In addition, all of our 14 district directors were contacted and enthusiastically supported my appearance before this committee in her behalf.

Her integrity and morality we believe are above reproach. She is a stable, moderate, gracious, well-adjusted woman.

In conclusion, please allow me to reiterate my pleasure at participating in this historical event on behalf of the National Association of Women Judges. We urge the immediate confirmation of Judge O'Connor so that she can be in place and ready to proceed on the first Monday in October.

The CHAIRMAN. Judge, would you tell us the position you hold?

Judge KLEIN. I am a presiding justice of the California Court of Appeals, sir, and president of this national association.

The CHAIRMAN. Thank you very much.

Are there any questions of this witness?

Judge KLEIN. It doesn't look like there is anybody here to ask. [Laughter.]

The CHAIRMAN. If there are no questions from this witness, we thank you very much, Judge Klein, for appearing.

Judge KLEIN. Thank you, sir.

[Material follows:]

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PREPARED STATEMENT OF THE HON. JOAN DEMPSEY KLEIN

It is with extreme pleasure that I appear before this honorable Committee to speak on behalf of the confirmation of the first woman nominee to the United States Supreme Court in its 191 years of existence. It is indeed a glorious occasion for women everywhere, and in particular for the women judges of America.

I am before you in my capacity as President of the National Association of Women Judges, an association with which over one-half of the nation's female federal and state judges have affiliated, along with a number of male judges.

The purposes of the National Association of Women Judges are as follows:

> ". . .[T]o promote the administration of justice; to discuss legal, educational, social and ethical problems mutually encountered by women judges and to formulate solutions; to increase the number of women judges so that the judiciary more appropriately reflects the role of women in a democratic society; and, to address other important issues particularly affecting women judges. . . ."

As you might well imagine, the appointment of a woman to assume a rightful seat on the highest court has had top priority on our agenda. It seems to have been such a long time coming, but when considered in historical perspective, perhaps the 191 years is a reasonable period of time.

The legal roots of this nation are in the English common law and that law classified women in the same category as chattels, children and incompetents. As a consequence, women's activities outside the home were extremely restricted, including the opportunity to become educated. Even so, Myra Bradwell qualified herself, but she was denied a license to practice law by the State of Illinois in 1873. In refusing her that right, the Supreme Court said:

> "The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother.
>
> "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . ."

The cherished words of the Declaration of Independence that "all men are created equal" and are entitled to the "unalienable rights [of] life, liberty and the pursuit of happiness" -- were written with only white males in mind. From the beginning, women have had to wage a constant struggle to participate in "civil life." A constitutional amendment was required just 61 years ago to allow women to engage in the most basic and sacred right in a democracy -- the right to vote. Although adopted in 1868, the much heralded clause in the 14th Amendment guaranteeing "all persons" the equal protection of the laws has not protected women from laws that discriminate against women on the basis of sex. It was not until 1971 that the United States Supreme Court declared unconstitutional a blatantly sexually discriminatory state law because it violated the 14th Amendment.

Societal changes in the lives of American women have come about slowly but surely. Compared to our mean beginnings,

the changes are of staggering proportions. Women constitute over 42% of the nation's work force, and over 50% of all women are gainfully employed outside the home. Women are seeking professional training in law and medicine and are participating in political decision-making in ever-increasing numbers. Today's factual knowledge of women indicates that indeed they are engaged in all aspects of "civil life."

However, as timely as we consider this appointment to be, and as eager as we are to have such an appointment become a reality, we are emphatic that the woman selected be of the highest caliber. By virtue of the fact that so many of us have been the "first woman judge" or the "only woman judge" in any number of situations, we are keenly aware of the spotlight focused on our every act, and the scrutiny to which we are continually subjected. Such attention will be magnified in the case of the "first woman justice on the Supreme Court!" Her performance will reflect on all of us lesser judicial luminaries, and we want to be assured that she has the capacity to succeed.

For these reasons and more, I am very pleased to report that the National Association of Women Judges finds the nominee, the Honorable Sandra Day O'Connor, to be exceptionally well qualified.

Certain selected Association members participated in the evaluation of Judge O'Connor and made the customary inquiries relating to professional competency, judicial temperament and integrity.

In addition, each of the 14 district directors of the Association from throughout the country were contacted, and each one commented favorably on Judge O'Connor and urged my appearance on her behalf before this honorable body.

The investigation disclosed among other data that Judge O'Connor is 51 years of age, mature, yet youthful, and possessed of great vitality and good health. She graduated from Stanford Law School, one of the most prestigious institutions of legal education in the world, where she was a member of Law Review, and graduated Order of the Coif in 1952.

Her diversified legal/judicial career includes service as a deputy county attorney in California, a civil lawyer for the Quartermasters Corps of the United States Army, private practice, and an assistant state attorney general in Arizona.

Judge O'Connor rather uniquely also served in the Arizona State Senate, where her colleagues elected her majority leader.

Following her legislative career, she presided as a trial judge in the superior court until her elevation to the Arizona Court of Appeals. She was sitting with distinction as an associate judge on the appellate court at the time President Reagan made his momentous decision to name a woman to the highest court. During that time, she authored some 29 opinions, which are described as concise and cogent, orderly, lucid and logical. I have read several of them and would agree with that analysis.

Judge O'Connor's experience on the appellate bench serves to prepare her for the work ahead. By contrast, at least 15 of the prior 101 Supreme Court justices had no judicial experience whatsoever, or a bare minimum prior to their appointments. These numbers include three of the justices currently serving with distinction.

In discussing Judge O'Connor with persons who either know her personally or who have knowledge of her, certain words keep recurring -- brilliant, fair, pragmatic, rational, hard-working, self-confident, flexible, conscientious, tough,

and perfectionist. She has a reputation as an evenhanded, no-nonsense person with a precise legal mind, given to judicial restraint.

Her integrity is above reproach and she is financially sound. She is a stable, moderate, gracious, and well-adjusted woman. With her high degree of professional competency, innate intelligence and passion for hard work, she has every potential for becoming an outstanding Supreme Court Justice. As the first justice with experience in all three branches of government -- executive, legislative and judicial -- and as a woman -- she will bring to the high court a valuable perspective it has lacked to date.

In conclusion, I reiterate my pleasure at participating in this historical event on behalf of the National Association of Women Judges. We hereby set forth our evaluation with the finding that Judge O'Connor is exceptionally well qualified to this honorable Committee for its consideration. We urge the immediate confirmation of Judge O'Connor so that she can be in place and ready to proceed on "The First Monday in October."

Respectfully submitted,

Joan Dempsey Klein,
Presiding Justice,
California Court of Appeal;
President,
National Association of Women Judges

The CHAIRMAN. In view of the fact that there is a vote on now and the 5-minute bell will come on any second, Dr. Willke and Dr. Gerster, we will ask you to come back at 2 o'clock if you will and continue your testimony at that time.

We will now take a recess until 2 o'clock.

[Whereupon, at 1 p.m., the committee recessed, to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION

The CHAIRMAN. The Judiciary Committee will come to order.

We shall now continue with the testimony of Dr. Willke and Dr. Gerster. Senator Denton of Alabama I believe is next in line for questioning.

TESTIMONY OF DR. J. C. WILLKE AND DR. CAROLYN F. GERSTER, NATIONAL RIGHT TO LIFE COMMITTEE—Resumed

Senator DENTON. Thank you, Mr. Chairman.

Good afternoon, Dr. Willke, Dr. Gerster. I would like to begin by expressing my gratification that the dialog that has been taking place, that respective points of view on the subject of abortion are being presented so well, by parties at this dais and by you two.

I certainly agree with you that it is a basic issue, one which is about as single an issue as whether or not murder is disqualifying if one has that habit, but for those who do not see it as you do and as I do, I certainly do not feel any sense of condemnation. I only hope that we can keep dialoging about it until we have enough of us thinking the truth about it, and I am not sure that I come down in precisely the right spot myself.

I am sorry that all the Senators did not hear the answers to some of the questions and some of the dialog, especially between Senator Metzenbaum and you two, and the answers to Senator Grassley's questions.

I have been thrust into this abortion issue since arriving at the Senate, without any intent on my part to be so involved, by virtue of being on the Aging, Family, and Human Services Subcommittee, and in that capacity have had to address family planning, title 10, and have had a bill which I originated passed, called "Adolescent Family Life," which sort of reverses the context of the Government's up to now involvement in sex education, adolescent pregnancy, that sort of thing.

Whether or not that law gets appropriated in the new crunch that we have economically is going to be another question, but it was passed unanimously on Labor and Human Resources Committee with Senator Metzenbaum and Senator Kennedy and others voting for it. My problem is in communicating to the other Senators and Congressmen this situation. It is misperceived. Once they understand it, everything is fine.

I share your concern. I have learned in that program, for example, in the hearings that we had on that, that a half a million teenagers are aborting their children per year and the number is going up every year. Therefore, Judge O'Connor's position that she disapproves of abortion as a means of birth control unfortunately is not being applied from within our own Government now because

the way title 10 is administered, these girls are counseled to get abortions. The two diseases are expressed to them as venereal disease and pregnancy; the two cures are penicillin and abortion. Therefore, it has been a somewhat dismaying experience, and if my little bill does not get funded it will be even more dismaying.

I think Senator Metzenbaum started out the real dialog when he said that his concern is for the living, and that he felt compassion for those who were poor and already had enough children and things like that. You all made the point so well that the child in the womb is also living, and especially in the case of one which is old enough or far enough developed to be taken from the womb and live, it is very difficult not to interpret abortion in that case as murder.

It is not too far an extension to that to get to the point where, well, if you want to take care the poor, if you have four children and a couple of them are under 2 years old, maybe the best thing to do is gas them. As you well know, in other societies which are not based upon compassion, not based upon respect for the dignity of life and the equality of that life, we do have such manifestations as in Nazi Germany: abortion first, then euthanasia and infanticide, as we have in this country to a great degree already, and then the killing of the Jews selectively, the extermination of the mentally retarded, the physically disadvantaged, all of which took place within the lifetimes of many of us.

My own special consciousness, probably unique in this room, comes from the fact that I lived in a similar society for almost 8 years and I saw the result of what happens, human being to human being, when there is no principle derived from a concept of God, when there is atheism, when the government is totalitarian. I saw people killed because of political dissidence. I saw them tortured. I saw a man's eye cut out slowly, a North Vietnamese, because of his political disagreement with what the North Vietnamese were doing.

We now have the horrible tragedy of tens of millions of Southeast Asians enslaved to that system, which is even a greater slavery or a worse form of slavery than that which you referred to, Dr. Willke, in our own country. As hideous as that form was, it was not so hideous as to cause the slaves to get on logs, overburdened boats and flee with less than a 50-percent chance of survival in terms of their lives.

My disagreement with Senator Metzenbaum would devolve in a number of places but particularly when he talks about violence, say in El Salvador. As I said in my senatorial campaign in Alabama, the Civil War involved the highest rate of casualties per troop engaged of any war in recorded history. While war is hell, as Sherman said, there are worse forms of hell. There are forms of hell that last longer, kill more people, cause more suffering. Slavery was one of those.

As an Alabamian, as a white person, I believe that the Civil War to the degree that it was caused by slavery was well worth the candle. I believe that the war in Vietnam, to the degree that it was caused by the impulse to try to protect those whom we were pledged to protect against this kind of slavery, even worse than that other, was worth the candle. I am sorry that we have become

disoriented in that respect. I hope we recover orientation in that respect.

That Soviet or totalitarian, Communist system has no respect for equality, no respect for human life. I was more sorry for those among whom I found myself who were so-called free than I was for my fellow prisoners.

If we do not realize once and for all what our Founding Fathers did and get back to seeing free enterprise in all of its senses—not just economic but the freedom to grow flowers if one wishes, the freedom to play the violin for one's own enjoyment or the enjoyment of others if one so wishes, the freedom to try to become President of the United States if one so wishes—and have that all permitted by a spirit of compassion, consideration for the rights of others derived from a "love thy neighbor as thy love thyself" concept, not to appreciate that as I grew to appreciate it watching the suffering of people committed to another system by no will of their own—were they able to vote, they would vote out of it—it makes me particularly ill to see our own society losing sight of what it is that has been passed on to them.

What is the genius of the Founding Fathers? What is the germ from which this greatness grew? That is what we are dealing with when we deal with the subject of abortion, in my opinion. I think you are entirely justified in saying that it is a once-in-a-century type issue, very similar to slavery, I think even more basically fundamental than the issue of slavery.

I would ask you both—perhaps Dr. Willke first—what do you think is the effect and what do you think is the significance of the *Roe* v. *Wade* decision as it relates to the power of Congress now to act perhaps without a constitutional amendment? What do you see as the power of Congress to right the present situation, in view of *Roe* v. *Wade*? What are the constraints and possibilities that you see?

Dr. WILLKE. Senator Denton, clearly *Roe* v. *Wade* established by that edict, we call it, three brandnew issues. The first thing it did was remove legal personhood on the basis of place of residence. Let me explain that.

I mentioned a bit earlier that abortion is legal until birth, and that is true. A person cannot be convicted of a crime if that physician kills a baby even while the mother is in labor, but as soon as that child enters the air world and is detached from the mother, birth is completed, then all of the civil rights of this Nation descend to apply and hover about to protect that child, for the child now is a legal person and has civil rights.

Therefore, we call abortion discrimination on the basis of the place of residence. If you will pardon the vernacular, if the kid can escape from that little house the night before his scheduled execution, his life can be saved, for the womb has become a tomb. That was one finding, legal personhood. The loss of that reduced the unborn child to the status of property of the owner.

The second major finding of *Roe* v. *Wade* was the creation of a brand new right. That right, called a right of privacy, is perhaps more accurately described as a right of private killing for it gave to a mother a right that had never existed before, that was not written in the 14th amendment but the Justices said that it was

meant by the 14th amendment: That was the right to privately ask for the killing of her unborn, the only restriction being that a physician had to do it. That right may well be superior even to personhood, if that were capable of being restored by this Congress. That issue is controversial; there are differing opinions.

Finally, there was a third holding that gave the State a "compelling" interest in the maintenance of the mother's "health." About an hour ago I defined "health" as defined by the Supreme Court. Therefore, it could well be that a State court, interpreting "health" in that broadest sense of social distress, might rule on the basis of *Roe* v. *Wade*, *Doe* v. *Bolton*, that to maintain a woman's health there had to be abortion on demand.

Now the question: What can the Congress do? Clearly the final answer, the one equivocal answer, the one that is out there and the one that we all seek is a constitutional amendment so worded that it will reverse all three of those findings. That is within the power of Congress to report that amendment out. It takes two-thirds of both Houses, and this is what we have been asking for.

There is some disagreement, some controversy as to the wording of that, and we will shortly have full hearings on that, a fact that you are only so well aware of. We are going to be further enlightened on that score.

We plead with the Congress to do that, for at the moment we live in a Nation that is totally polarized on this issue. Unlike other issues in the body politic, there is no midground, there is no compromise. A baby is either a baby or not, either alive or dead. While the issue becomes more and more important in our Nation, the polarizations also rise.

What exists today in law, through a Court decision, is one extreme polarity of value judgment: Abortion on demand until birth, in all 50 States. It could not be worse. What we are asking for is the opposite polarity: Equal protection by law for all living Americans from the time their human life begins at fertilization. There is a yawning gulf between the two.

We plead with Members of Congress, the House and Senate, to please quit imposing their morality on the Nation by doing nothing, for by doing nothing they maintain the status quo. You see, a Member of either House would not necessarily have to be either pro or con on the issue; all they would have to be is, "I believe the people should decide, and therefore I will report out the amendment that the right-to-life people want, recognizing it to be that other polarity."

That could be a Senator's solemn duty even though they disagreed with the amendment. The simple concept would be, send it to the States, let the people decide. If in fact three-fourths of the States do ratify, that clearly is the wish of this Nation. If three-fourths cannot, they have had their chance. We would suggest that without question is where we hope this will be.

Senator DENTON. Dr. Gerster, would you care to comment, particularly with respect to some of the previous glimmerings you gave us into children being born alive, or, you know, that sort of gory reality about abortion which *Roe* v. *Wade* made possible?

Dr. GERSTER. I believe that Dr. Willke has really said it all. I think what has happened is, as Albert Schweitzer once said,

"When you lose respect for any part of life, you lose respect for all of life."

The National Right to Life Committee is, of course, as involved in euthanasia and nontherapeutic human experimentation without informed consent or done on individuals incapable of informed consent, whether they are prisoners or children or retarded.

Probably the most dangerous words in *Roe* v. *Wade* were the words "meaningful life," because it opened the doors to reclassification of human beings whose lives were other than meaningful. As you mentioned yourself very movingly the reason for your involvement in this issue, my involvement stemmed from the fact that my husband was born and raised in Hitler's Germany during the Third Reich. I for this reason developed a hunger for knowledge about what happened to the German people and the German medical community.

I think the tragedy that is not appreciated in this country is that the euthanasia program that you alluded to in Germany was planned, not by Nazis, but by physicians, mostly psychiatrists and pediatricians. The plans were put forth in a book written in 1920 by Benigen Holke, and the words, "Lebens Unvertichs Leben," life not worth living, first appear in that book, 13 years before the world had ever heard of Adolf Hitler.

By reclassifying human beings it could be predicted, not only the euthanasia programs that are a reality in America regarding the born, handicapped children of all ages, but in the realm of human experimentation, I testified earlier probably the worst example regarding the premature baby with the decapitation and cannulation of the internal carotid artery of the heads of the infants born alive, but I recall another group of human beings that were reclassified.

They were retarded children at Willowbrook, and a very famous scientist, Dr. Saul Krugman, in developing hepatitis vaccine injected 25 children at Willowbrook Home for Retarded with living hepatitis-B. Nobody died. However, the defense, I think, of the experiment as it appeared, as I recall, in an article in the Journal of the American Medical Association, was that conditions were so bad at Willowbrook that the children probably would have developed hepatitis anyway. I will always remember that, I think, as so representative of what we term the antilife philosophy. The obvious, positive solution was to clean up conditions at Willowbrook.

However, worse than that, I recall the defense of the experiment in the New England Journal of Medicine. Many may ask what this has to do with abortion. It has a lot to do with abortion because we have agreed to take life, knowing that it was life. What I am describing now is not part of the Neuremberg trials; it is American medicine in this century.

At any rate, the comment regarding experimentation on the retarded that appeared in the New England Journal was—and I do not have to look at any note. It is engraved on my heart—it was that if we are about to study disease in children, there is no substitute for experimentation on children; that the only question is whether we are to do the initial experiments in children and adults with potential, or children who are human in form only. I

suggest to you that those words are echoes of the Neuremberg doctors' trials in 1947.

If I could just close with one sentence, it would be the remarks of a physician with remarkable foresight. In the midnineteenth century, Dr. Hufflin said, "When a physician presumes to take into consideration in the course of his practice whether life has value or not, the possibilities are limitless, and the physician becomes the most dangerous man in the State."

Senator DENTON. Thank you, Dr. Gerster.

Dr. Willke, you have had a lot of experience with abortions with babies born alive. I would ask, before you undertake your mention of that, I would ask the chairman that an article in the Philadelphia Inquirer of August 2, 1981 in the Today Sunday insert, "Abortion: The Dreaded Complications," by Liz Jeffries and Rick Edmunds, be entered in the record of these proceedings, sir. I have the reference here in writing.

The CHAIRMAN. I just wondered if you want it in the printed record, or would you just want it in the records of the committee?

Senator DENTON. The printed record, sir.

The CHAIRMAN. What is the length of it? How long is it? Do you have a copy of it there?

Dr. WILLKE. Mr. Chairman, I have a copy here if you care to examine it. It is perhaps three or four pages in a Sunday supplement here.

The CHAIRMAN. We are really not having a hearing on abortion; we are having a hearing on the question of the fitness of the nominee, and I think it is all right to ask questions, any question you want to, but I do not want to go into great depth on any one side issue and fill up the record with that. I am just wondering, if this is just a short article we might put it in; if it is not, then I would suggest we put it in the files of the committee, and it could be reserved there until you do have questions on the subject of abortion.

Senator DENTON. The only relevance, Mr. Chairman, that I would suggest is that the point has been made that this is a single-issue matter similar to gun control or tobacco tax or something like that, and I believe that—I do not intend to fill up the proceedings or the record. It is entered with respect to that issue, to indicate that it is an issue of a century and perhaps the issue of our history, if we continue going this way.

Before you start, Dr. Willke——

The CHAIRMAN. Doctor, what is the length of that article?

Dr. WILLKE. Your lady is bringing it up there, Senator. I did not copy the line inches. I do not know. It starts about halfway through the supplement and, as I recall, it is several pages.

Senator DENTON. It contributes to placing in scale the degree of importance of this single issue. I defer to your judgment, Mr. Chairman. To save time, I would like to relate one quick anecdote in extension of the remarks made by Dr. Gerster.

Some of you here may have seen a television program, perhaps a year ago, showing an interview with a young man, 21 years old, who was about 38 inches high, had but one eye, one ear, no arm, was born that way, very deformed; had been left in a garbage can,

the offspring of a British prostitute, found and brought into a home, a public home, to take care of orphans.

That child developed in that orphan home, felt despised, would bite people at age 16, spit at them and so forth, in a frenzy of hatred for humankind. At age 21, 5 years later, after having been adopted by a loving British couple who were very poor, he was a star student at Oxford, an extremely accomplished musician, an orator, won many debating contests in and around London, and was one of the happiest people I have ever seen in my life.

I understood that happiness because there were times when I, by all estimates that I would have made before I was in those conditions, would have considered I could not possibly be happy were I so disadvantaged, encumbered, and so forth. That young man was in the same sort of frame of mind. I have not recovered that since I have gotten back to normalcy but I had almost that degree of happiness as he had, and I understood that.

I kind of think it shows something about the relative importance of what might be called "meaningful life." Who would have defined what that lad would have been, at age 16? Would he not have been a leading candidate for experimentation or extermination in a system which neglects the infinite importance of respect for life?

Would you care to elaborate on those abortions, and that will be the last question I ask, Dr. Willke.

Dr. WILLKE. Senator Denton, the article which is written by two authors, both of whom admit that their position is in favor of abortion and continue that at the end of the article, details what is called the dreaded complication, that being a live birth from an induced abortion, very well researched.

It was in the Philadelphia Inquirer in the Sunday section, and simply what it says is that there is one live birth daily in the United States from attempted abortions. These are usually midtrimester abortions, most commonly of course by prostaglandin, which induces labor at no matter what stage of the pregnancy the woman is.

The point to be made here, I believe, is that this is legal. It is legal in all 50 States; it is legal in this United States, and I think it is important to bring that out because of the fact that these hearings are being held, and because of a series of laws that the nominee voted for which directly permit this sort of thing to happen. In fact, there was one live birth, very publicized, in Arizona just recently.

Dr. GERSTER. Yes, it led to a series of articles in the Arizona Republic, Arizona's leading newspaper. What had occurred was that a saline abortion had been attempted on a woman 32 weeks pregnant and the child, a little girl, was born alive at Doctor's Hospital. The doctor was not present at the abortion, and the nurse, succumbing to those basic instincts of nurses all over the world, took the baby to the nursery. The baby was later transported to St. Joseph's Hospital and was, a few weeks ago, released in perfect health.

There is a long string of circumstances that followed that case. A nurse of the abortionist called us and spoke about human experimentation, so I gave her the number of the reporter that had written the story.

It turned out that, as reported in the Arizona Republic, a pharmaceutical company that is usually famous for its vitamin pills, Squibb & Co., was reported in the Republic as having paid a large sum of money—reputed to be $10,000—to the abortionist, all legally, you understand, except for the fact that we have a fetal experimentation law in Arizona which some States do not have.

A large dose of antihypertensive agent which is being developed by Squibb was given to pregnant women. Amniotic fluid was drawn 2 to 3 days prior to the abortion. The abortion was to be a prostaglandin abortion because saline evidently interferes with the study. At the end of the time, Squibb had requested amniotic fluid, blood of the baby, blood of the mother, and a piece of the baby's liver.

I do not want to dwell on these things, and I know that the chairman has asked if this was not a peripheral issue. However, I think Senator Metzenbaum—who is no longer present, unfortunately—spent a great deal of time asking us why this to us is a more important issue than any other. The abortion of that 32-week-old baby was perfectly legal. There is no question that there are no criminal charges being brought against the doctor for the abortion.

In the State of Arizona we have an endangered species law. An individual that crushes a gila monster egg—this is one of the only two poisonous lizards left in the world—not the gila monster, only the egg—is subject to a fine of $750 and 4 months in jail, but you can kill a baby to 9 months in the State of Arizona with impunity. I suggest to this committee that when this becomes the law of the State, this is a sick society.

There was one bill that Senator O'Connor introduced which could be interpreted as a prolife bill, and I do not say this with any degree of levity. It was introduced on January 16, 1973. There was a great deal of publicity in Arizona, adverse publicity, because we were shooting buffalo in enclosures with high-powered rifles. It became the subject of a book by Mr. Swarthout, an Arizona author, and a famous motion picture called, "Bless the Beasts and the Children."

There was all sorts of outcry against this inhumanity to buffalo, and so Senator O'Connor introduced the following bill relating to "game fish, the taking of game animals under certain conditions." The purpose of the act was "to prohibit the shooting or taking of game animals in an inhumane manner."

Section A says that:

> Except as provided in subsection (b), the Commission shall not permit the taking or shooting of any game animal, including but not limited to buffalo, under any condition in which such animal is restrained in an enclosure of such a size as to prohibit its escape from the range of the weapon.

I suggest to you that the baby, if reclassified as a game animal, is certainly enclosed so as to prohibit escape.

Senator DENTON. Thank you, too.

I want to say for the record that I know that this chairman is not edified by the fact that the Supreme Court committed an act of judicial activism. I believe he is of the opinion that they should not have. I regard all of his admonitions toward me as justified. I think he is the fairest chairman I have ever encountered.

I would like to thank him for his generosity and graciousness with respect to a rather prolonged effort to substantiate that abor-

tion is an unusual single issue, one which eats away perhaps—at least in my belief—does eat away at the foundation of the theory which sustains this country. I believe that the opinions and prospective rulings of a Supreme Court Justice in this matter are pertinent to anyone's concern about the general welfare, and that is why I undertook such a long exploration into the subject.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator, what did you decide about that article? Do you want it to go in now or be placed with the records in the committee? How would you prefer to handle it.

Senator DENTON. We would like to put it in now, and we are not going to use it in any other way.

The CHAIRMAN. Without objection, so ordered.

[Material supplied follows:]

[From the Philadelphia Inquirer, Aug 2, 1981]

ABORTION

(By Liz Jeffries and Rick Edmonds)

A woman's scream broke the late-night quiet and brought two young obstetrical nurses rushing to Room 4456 of the University of Nebraska Medical Center. The patient, admitted for an abortion, had been injected 30 hours earlier with a salt solution, which normally kills the fetus and causes the patient to deliver a mass of lifeless tissue, in a process similar to a miscarriage.

This time, though, something had gone wrong. When nurse Marilyn Wilson flicked on the lights and pulled back the covers, she found, instead of the still born fetus she'd expected, a live 2½-pound baby boy, crying and moving his arms and legs there on the bed.

Dismayed, the second nurse, Joanie Fuchs, gathered the squirming infant in loose bedcovers, dashed down the corridor and called to the other nurses for help. She did not take the baby to an intensive care nursery, but deposited it instead on the stainless steel drainboard of a sink in the maternity unit's Dirty Utility Room—a large closet where bedpans are emptied and dirty linens stored. Other nurses and a resident doctor gathered and gaped.

Finally, a head nurse telephoned the patient's physician, Dr. C. J. LaBenz, at home, apparently waking him.

"He told me to leave it where it was," the head nurse testified later, "just to watch it for a few minutes, that it would probably die in a few minutes."

This was in Omaha, in September 1979. It was nothing new. Hundreds of times a year in the United States, an aborted fetus emerges from the womb kicking and alive. Some survive. A baby girl in Florida, rescued by nurses who found her lying in a bedpan, is 5 years old now and doing well. Most die. The Omaha baby lasted barely 2½ hours after he was put in the closet with the dirty linen.

Always, their arrival is met with shock, dismay and confusion.

When such a baby is allowed to die and the incident becomes known, the authorities often try to prosecute the doctor. This has happened several dozen times in the past eight years, most recently in the case of Dr. LaBenz, who is to go on trial in Omaha this fall on two counts of criminal abortion. But interviews with nurses, some of them visibly anguished, uncovered dozens of similar cases that never reached public attention.

In fact, for every case that does become known, a hundred probably go unreported. Dr. Willard Cates, an expert on medical statistics who is chief of abortion surveillance for the Center for Disease Control in Atlanta, estimates that 400 to 500 abortion live births occur every year in the United States. That is only a tiny fraction of the nation's 1.5 million annual abortions. Still, it means that these unintended live births are literally an everyday occurrence.

They are little known because organized medicine, from fear of public clamor and legal action, treats them more as an embrassment to be hushed up than a problem to be solved. "It's like turning yourself in to the IRS for an audit," Cates said. "What is there to gain? The tendency is not to report because there are only negative incentives."

One result of the medical community's failure to openly acknowledge the problem is that many hospitals and clinics give their staffs no guidelines for dealing with

abortion live births. Even where guidelines exist, they may not be followed. The doctor is seldom present when a live birth occurs, because most late abortions—those done later than the midpoint of pregnancy—are performed by the injection of a solution (the method used in the Omaha case) that slowly induces delivery of the fetus many hours later. Crucial decisions therefore fall to nurses and physician residents with secondary authority over the case.

Signs of life in the baby may or may not be recognized. At some hospitals a liveborn abortion baby is presumed dead unless it conspicuously demonstrates otherwise, by crying or waving its arms and legs. Even then, the medical personnel on the scene may let the baby die rather than try to save it.

Because they are premature, these infants need immediate care, including machine support, in order to live. Given such care, many can survive in good health, as did a pair of abortion babies born in separate incidents in Wilmington, Del., in the spring of 1979 and since adopted. Others are too premature to be saved even with the best care.

Whether they live or die, these abortion live births—and even successful, routine abortions of late terms, highly developed fetuses—are taking a heavy emotional toll on medical staffs across the country. Some physicians say they have "burned out" and have stopped doing abortions altogether. Nursing staffs at hospitals in Cleveland, Grand Rapids, Fort Lauderdale and elsewhere have rebelled at late abortions and have stopped their hospitals from performing any abortions later than the midpoint of pregnancy. Some staff members who regularly perform late abortions report having nightmares about fetuses, including recurring dreams in which they frantically seek to hide fetuses from others.

In legalizing abortion in 1973, the Supreme Court said it was reserving the right to protect the life of a viable fetus—that is, one with the potential to survive outside the womb. But the court never directly acknowledged the chance of an aborted fetus' being born alive, and it therefore never gave a clear guideline for dealing with what Dr. Thomas Kerenyi, a leading New York expert on abortions, has called "the dreaded complication."

Twenty states (including Pennsylvania, New Jersey and Delaware) have no laws limiting late abortions or mandating care for live-born abortion babies. Even where such state laws exist,
unconstitutional.

"Everyone—doctors, attorneys, state legislators—is looking for some clear guidelines concerning disposition of these infants," said Newman Flanagan, district attorney for the City of Boston. "If a baby has rejected an abortion and lives, then it is a person under the Constitution. As such, it has a basic right to life. Unfortunately, it is difficult to protect that right, because there are no guidelines addressed to this specific issue."

Medical trends indicate that abortion live births will continue. They may even become more frequent. For one thing, demand for late-term abortions is undiminished, and with the growing popularity of genetic testing to screen for fetal defects midway through pregnancy, educated and affluent women are now joining the young, the poor and the uninformed who have been, until now, the main groups seeking late abortions.

Furthermore, estimating the gestational age of a fetus in the womb—a crucial aspect of a successful abortion—remains an inexact art. In March, doctors at the Valley Abortion Clinic in Phoenix estimated that one woman was 19 to 20 weeks pregnant; days later she delivered not an aborted fetus but a 2½-pound, 32-week baby. It survived after two months of intensive care at a Phoenix hospital.

Finally, medical science in the past 10 years has greatly improved its ability to care for premature babies. Infants are becoming viable earlier and earlier. Those with a gestational age of 24 weeks and weighing as little as 1½ pounds can now survive if given the best of care.

So long as doctors perform abortions up to the 24th week of pregnancy (as is legal everywhere in the United States under the 1973 Supreme Court ruling), it is statistically certain that some of these borderline cases will turn out to be viable babies, born alive. It happened again last May in Chicago—a 19-to-20-week estimate, a live-born 2-pound baby boy.

By ignoring the problem of abortion live births, the courts and the medical establishment are choosing to overlook a long, well-documented history of cases: *January 1969*, Stobhill Hospital, Glasgow, Scotland: A custodian heard a cry from a paper bag in the snow beside an incinerator. He found a live baby. It was taken inside and cared for in the hospital's operating theater but died nine hours later. The infant's gestational age had been estimated at 26 weeks by the physician performing the abortion. It was actually closer to 32 weeks. No efforts were made to check for signs of life before the aborted baby was discarded. No charges were filed.

Because the case had been written about in British medical journals, it was a matter of record—before abortion was legalized in this country—that such things could happen.

April 1973, Greater Bakersfield Hospital, Bakersfield, Calif.: A 4½-pound infant was born live following a saline abortion (induced by an injection of salt solution) performed by Dr. Xavier Hall Ramirez. Informed by phone, Dr. Ramirez ordered two nurses to discontinue administering oxygen to the baby. His instructions were countermandated by another doctor; the baby survived and later was placed for adoption. Ramirez was indicted for solicitation to commit murder. His attorney argued that a medical order based on medical opinion, no matter how mistaken, is privileged. Dr. Irvin M. Cushner of the University of California at Los Angeles, later to become a top health policy official in the Carter administration, testified that it was normal for Ramirez to expect the delivery of a dead or certain-to-die infant as the result of a saline abortion.

July 1974. West Penn Hospital, Pittsburgh: Dr. Leonard Laufe performed an abortion on a woman who contended she had been raped—though that and her account of when she became pregnant were later disputed. She had been turned down for an abortion at another hospital, where the term of her pregnancy was estimated at 26 to 31 weeks. Laufe put it at 20 to 22. The abortion, induced by an injection of prostaglandin, a substance that stimulates muscle contraction and delivery of the fetus, was filmed for use as an instructional film. The film showed the three-pound infant moving and gasping. Also, a nurse and a medical student testified that they had noticed signs of life. No charges were filed, however, after a coroner's inquest at which Laufe testified that the infant sustained fatal damage during delivery.

February 1975, Boston: Dr. Kenneth Edelin was convicted of manslaughter for neglecting to give care to a 24-week infant after a 1973 abortion at Boston City Hospital. Witnesses said Edelin held the infant down, constricting the flow of oxygen through the umbilical cord and smothering it. He was the first and only American doctor ever convicted on charges of failing to care for an infant born during an abortion. The conviction was overturned by the Massachusetts Supreme Court on the ground that improper instructions had been given to the jury. Edelin and his lawyer argued that he had taken no steps to care for the infant because it was never alive outside the womb.

March 1977, Westminster Community Hospital, Westminster, Calif.: A seven-month baby girl was born live after a saline abortion performed by Dr. William Waddill. A nurse testified that Waddill, when he got to the hospital, interrupted her efforts to help the baby's breathing. A fellow physician testified that he had seen Waddill choke the infant. "I saw him put his hand on this baby's neck and push down," said Dr. Ronald Cornelson. "He said, 'I can't find the goddamn trachea,' and 'This baby won't stop breathing.' " Two juries, finding Cornelson an emotional and unconvincing witness, deadlocked in two separate trials. Charges against Waddill were then dismissed. He had contended the infant was dying of natural causes by the time he got to the hospital.

July 1979, Cedars-Sinai Medical Center, Los Angeles: Dr. Boyd Cooper delivered an apparently stillborn infant, after having ended a problem pregnancy of 23 weeks. Half an hour later the baby made gasping attempts to breathe, but no efforts were made to resuscitate it because of its size (1 pound 2 ounces) and the wishes of the parents. The baby was taken to a small utility room that was used, among other things, as an infant morgue. Told of the continued gasping, Cooper instructed a nurse, "Leave the baby there—it will die." Twelve hours later, according to testimony of the nurse, Laura VanArsdale, she returned to work and found the infant still in the closet, still gasping.

Cooper then agreed to have the baby boy transferred to an intensive care unit, where he died four days later. A coroner's jury ruled the death "accidental" rather than natural but found nothing in Cooper's conduct to warrant criminal action.

A common thread in all these incidents is that life was recognized and the episode brought to light by someone other than the doctor. Indeed, there is evidence that doctors tend to ignore all but the most obvious signs of life in an abortion baby.

In the November 1974 newsletter of the International Correspondence Society of Obstetricians and Gynecologists, several doctors addressed a question from a practitioner who had written in an earlier issue that he was troubled by what to do when an aborted infant showed signs of life.

One was Dr. Ronald Bolognese, an obstetrician at Pennsylvania Hospital in Philadelphia, who replied:

"At the time of delivery, it has been our policy to wrap the fetus in a towel. The fetus is then moved to another room while our attention is turned to the care of [the woman]. She is examined to determine whether complete placental expulsion has

occurred and the extent of vaginal bleeding. Once we are sure that her condition is stable, the fetus is evaluated. Almost invariably all signs of life have ceased."

(Bolognese recanted that statement in a 1979 interview. "That's not what we do now," he said. "We would transport it to the intensive care nursery.")

In addition, Dr. William Brenner of the University of North Carolina Medical School suggested that if breathing and movement persist for several minutes, "the patient's physician, if he is not in attendance, should probably be contacted and informed of the situation. The pediatrician on call should probably be apprised of the situation if signs of life continue."

Dr. Warren Pearse, executive director of the American College of Obstetrics and Gynecology, was asked in a 1979 interview what doctors do, as standard practice, to check whether an aborted fetus is alive.

"What you would do next [after expulsion] is nothing," Pearse said. "You assume the infant is dead unless it shows signs of life. You're dealing with a dead fetus unless there is sustained cardiac action or sustained respiration—it's not enough if there's a single heartbeat or an occasional gasp."

These seemingly callous policies are based on the assumption that abortion babies are too small or too damaged by the abortion process to survive and live meaningful lives. That is not necessarily the case, though, even for babies set aside and neglected in the minutes after delivery.

A nursing supervisor who asked not to be identified told of an abortion live birth in the mid-'70s in a Florida hospital. The infant was dumped in a bedpan without examination, as was standard practice. "It did not die," the nurse said. "It was left in the bedpan for an hour before signs of life were noticed. It weighted slightly over a pound."

The baby remained in critical condition for several months, but excellent care in a unit for premature infants enabled it to survive. The child, now 5 years old, was put up for adoption. The nursing supervisor, who has followed its progress, said she has pictures of the youngster "riding a bicycle and playing a little piano."

In the spring of 1979 two babies were born alive, five weeks apart, after saline abortions at the Wilmington Medical Center. They were given vigorous care, survived and were later adopted. One had been discovered by a nurse, struggling for breath and with a faint heartbeat, after having been placed in a plastic specimen jar. The second was judged to be a live delivery and was given immediate help breathing.

A baby girl, weighing 1 pound 11 ounces, was born in February 1979 after a saline abortion at Inglewood (Calif.) Hospital. Harbor General Hospital, which is associated with UCLA and is fully equipped to care for premature babies, was called for help, but the neonatal rescue team did not respond. The infant died after three hours.

The Los Angeles Department of Health Services investigated and was told that there had been confusion over the baby's weight and that it reportedly showed poor vital signs. It was "very unusual for them not to pick up [an infant] of this size," Dr. Rosemary Leake of Harbor General told investigators.

The administrator of a New York abortion unit, asked what would be done for a live-born abortion baby, said, "The nurses have been trained in how to handle this. I'd like to think we would do everything to save it. But honestly I'm not sure."

These incidents together suggest that life in an aborted infant may or may not be recognized. If it is, supportive treatment may or may not be ordered.

Such incidents, when discovered, often provoke prosecutions. A few may seem something like murder at first blush. But on closer inspection the doctors' actions have been judged, time and again, not quite to fit the definition of a crime.

Nowhere was this more vividly shown than in the case of Dr. Jesse J. Floyd, who was indicted on charges of murder and criminal abortion by a grand jury in Columbia, S.C., in August 1975. The charges were the result of an abortion a year earlier of a baby that appeared to have a gestational age of 27 to 28 weeks. It weighed 2 pounds 5 ounces and lived for 20 days.

In October 1979 the state dropped its case against Floyd. County prosecutor James C. Anders later conceded in an interview that South Carolina's abortion law was of dubious constitutionality. "In the second place," he said, "I had a reluctant witness [the infant's mother]. That and the passage of time worked against me."

A detailed record was developed in the case, as part of a federal suit that Floyd brought against Anders in which he sought to block the state prosecution. The 20-year-old mother, Louise A., lived in the small town of Hopkins, worked at a military-base commissary and had plans to enroll in a technical college. Those plans made her unwilling to have the baby she was carrying, so she presented herself for an abortion at Floyd's office in July 1974. Court records indicate that she had been told erroneously by her hometown doctor's nurse that she was not pregnant, and that she only slowly realized that she was.

Floyd found her to be past the first trimester of pregnancy, and under South Carolina law that meant an in-hospital abortion would be required. There were delays in her raising $450 for the abortion and more delays in admitting her to Richland Memorial Hospital. She was injected with prostaglandin on Sept. 4 and expelled the live baby early on the morning of Sept. 6.

"I started having real bad labor pains again," Louise recalled in her deposition, "and finally my baby was born. I called the nurse. Then about four or five of them came in the room at the time. The head nurse came in the same time the other nurses came in and she told me did I know that the baby was a seven-month baby. I told her no.

"One of the nurses said that the baby was alive. They took the baby out of the room. He never did cry, he just made some kind of a noise."

The first doctor on the scene, paged from the cafeteria, was a young resident. She did not hesitate. On detecting a heartbeat of 100, she clamped and severed the umbilical cord and had the baby sent to the hospital's intensive care unit.

"It was a shock, a totally unique emergency situation, very upsetting to all of us," the doctor, who now practices in California, said in an interview. "Some people have disagreed with me [about ordering intensive care for an abortion live birth] but that seems to me the only way you can go.

"It's like watching a drowning. You act. You don't have the luxury of calling around and consulting. You institute life preserving measures first and decide about viability later on."

Ten days after birth, the baby had improved markedly and was given a 50-50 chance of survival. Then he developed a tear in the small intestine and died of that and other complications on Sept. 26.

Louise A. never saw the child. She checked out of the hospital two days after the abortion and did not return. But she did show a passing interest in the baby's progress.

"I kept calling this nurse," Louise said in her deposition. "I would call . . . and get information from them about the baby, and they told me he was doing fine. They told me he had picked up two or three pounds. I started going to school, and one afternoon I called home and they told me the baby had died, but no one told me the cause of his death."

Floyd never saw the infant either. On the day of the abortion, his hospital privileges at Richland were withdrawn, and they have never been restored.

These circumstances presented prosecutor Anders with a difficult case. Floyd had had no physical contact with the live-born infant, nor was he issuing orders concerning its care. Nonetheless, Anders thought the doctor could be held responsible for the infant's death.

Anders pressed his murder charge using an old English common-law theory. Under this theory, willfully doing damage to a "vital" infant in the womb could be considered a crime against the fetus as a person. The abortion itself, Anders alleged, was an assault.

The line of argument is not entirely farfetched. For instance, a Camden, N.J., man was convicted of murder in 1975 after he shot a woman in the abdomen late in her pregnancy, causing the dealth of the twins she was carrying. But application of the theory to abortion had never been tested—in South Carolina or anywhere else.

South Carolina law in the mid-1970s prohibited third-trimester abortion unless two other doctors certified that the abortion was essential to protect the life or health of the mother. No such certifications were made for Louise. However, various Supreme Court rulings suggested that both the requirement of consultation with other doctors and the explicit definition of viability (as beginning in the third trimester) would make that law unconstitutional.

Floyd's lawyers, George Kosko of Columbia, S.C., and Roy Lucas of Washington, also filed voluminous expert affidavits on the difficult of estimating gestational age accurately. At worst, they argued, Floyd had made a mistaken diagnosis. What proof was there that he had intentionally aborted a viable baby?

District Court Judge Robert Chapman and the Fourth Circuit Court of Appeals agreed that the prosecution was based on flimsy evidence and should be blocked. However, the Supreme Court disagreed, in a ruling in March 1979, and suggested that judgment should be withheld on constitutional matters until the state prosecution had run its course. The way was thus cleared for Anders to proceed, but with witnesses dispersed, memories fading and the legal basis for prosecution still doubtful, Anders chose to drop the case.

Floyd, 49, continues performing first-trimester abortions at his Ladies Clinic, but the loss of hospital privileges and the damage to his reputation caused his surgical practice to collapse, he said.

The long legal proceeding also seems to have had a chilling effect on abortion practice throughout South Carolina, which Anders concedes was one of his intentions.

"The main thing is the dilemma it puts the other physicians in," Floyd said in an interivew. "It's just about dried up second-trimester abortions in this state. I have to send mine to Atlanta, Washington or New York."

Asked about late abortions and the risk of live births, Floyd said he thought abortions performed through the sixth month of pregnancy create "a problem to which there isn't an answer. We probably need to move back to 20 weeks. I would be reluctant to do one now after 20 weeks."

A similar case occurred about the same time in South Carolina, when Anders obtained a criminal indictment charging Dr. Herbert Schreiber of Camden, S.C., with first-degree murder and illegal abortion.

On July 18, 1976, a month after the charges had been filed, the 60-year-old doctor was found dead in a motel room in Asheville, N.C. A motel maid discovered the body slumped in a chair. Several bottles of prescription drugs were recovered from the room. Two days later the Buncombe County medical examiner ruled the death a suicide from a drug overdose.

Schreiber, who left no not, had pleaded not guilty to the charge of having kilied a live baby girl after an abortion by choking or smothering her to death.

Comparing the Floyd and Schreiber cases, Anders found an irony: Schreiber "just reached in and strangled the baby," the prosecutor said his evidence showed. "I charged him with murder, and he committed suicide. If he had been willing to wait, he probably would have been OK too"

Not every doctor who performs a late abortion has to confront an aggressive prosecutor like Anders. But even those abortion live births that escape public notice raise deeply troubling emotions for the medical personnel involved. "Our training disciplines you to follow the doctor's orders," explained a California maternity nurse. "If you do something on your own for the baby that the doctor has not ordered and that may not meet with his commitment to his patient, the mother can sue you. A nurse runs a grave risk if she acts on her own. Not only her immediate job but her license may be threatened."

Nonetheless, nursing staffs have led a number of quite revolts against late abortions. Two major hospitals in the Fort Lauderdale areas, for instance, stopped offering abortions in the late 1970s after protests from nurses who felt uncomfortable handling the lifelike fetuses.

A Grand Rapids, Mich., hospital stopped late-term abortions in 1977 after nurses made good on their threat not to handle the fetuses. One night they left a stillborn fetus lying in its mother's bed for an hour and a half, despite angry calls from the attending physician, who finally went in and removed it himself.

In addition, a number of hospital administrators have reported problems in mixing maternity and abortion patients—the latter must listen to the cries of newborn infants while waiting for the abortion to work. And it has proved difficult in general hospitals to provide round-the-clock staffing of obstetrical nurses willing to assist withg the procedure.

One young nurse in the Midwest, who quit to go into teaching, remembers "a happy group of nurses" turning nasty to each other and the physicias because of conflicts over abortion. Ond day, she recalled, a woman physician "walked out of the operating room after doing six abortions. She smeared her hand [which was covered with blood] on mine and said,'Go wash it off. That's the hand that did it.' "

Several studies have documented the distress that late abortion causes many nurses. Dr. Warren M. Hern, chief physician, and Billie Corrigan, head nurse, of the Boulder (Colo.) Abortion Clinic, presented a paper to a 178 Planned Parent-hood convention entitled "Waht About Us? Staff Reactions . . ."

The clinic, one of the largest in the Rocky Mountain states, specializes in the D&E (dilation and evacuation) method of second-trimester abortion, a procedure in which the fetus is cut from the womb in pieces. Hern and Corrigan reported that eight of the 15 staff members surveyed reported emotional problems. Two said they worried about the physician's psychological well-being. Two reported horrifying dreams about fetuses, one of which involved the hiding of fetal parts so that other people would not see them.

"We have produced an unusual dilemma," Hern and Corrigan concluded. "A procedure is rapidly becoming recognized as the procedure of choice in late abortion, but those capable of performing or assisting with the procedure are having strong personal reservations about participating in an operation which they view as destructive and violent."

Dr. Julius Butler, a professor of obstetrics and gynecology at the University of Minnesota Medical School, is concerned about studies suggesting that D&E is the

safest method and should be used more widely. "Remember," he said, "there is a human being at the other end of the table taking that kid apart.

"We've had guys drinking too much, taking drugs, even a suicide or two. There have been no studies I know of of the problem, but the unwritten kind of statistics we see are alarming."

"You are doing a destructive process," said Dr. William Benbow Thompson of the University of California at Irvine. "Arms, legs, chests come out in the forceps. It's not a sight for everybody."

No all doctors think the stressfulness is overwhelming. The procedure "is a little bit unpleasant for the physician," concedes Dr. Mildred Hanson, a petite woman in her early 50s who does eight to 10 abortions a day in a clinic in Minneapolis, just a few miles across town from where Bulter works. "It's easier to . . . leave someone else—namely a nurse—to be with the patient and do the dirty work.

"There is a lot in medicine that is unpleasant" but necessary—like amputating a leg—she argues, and doctors shouldn't let their own squeamishness deprive patients of a procedure that's cheaper and less traumatic.

However, Dr. Nancy Kaltreider, an academic psychiatrist a the University of San Francisco, has found in several studies "an unexpectedly strong reaction" by the assisting staff to late-abortion procedures. For nurses, she hypothesizes, handling tissues that resemble a fully formed baby "runs directly against the medical emphasis on preserving life."

The psychological wear-and-tear from doing late abortions is obvious. Philadelphia's Dr. Bolognese, who seven years ago was recommending wrapping abortion live-borns in a towel, has stopped doing late abortions.

"You get burned out," he said. Noting that his main research interest is in the management of complicated obstetrical cases, he observed: "It seemed kind of schizophrenic, to be doing that on the one hand [helping women with problem pregnancies to have babies] and do abortions."

Dr. John Franklin, medical director of Planned Parenthood of Southeastern Pennsylvania, was the plaintiff in a 1979 Supreme Court case liberalizing the limits on late abortions. He does not do such procedures himself. "I find them pretty heavy weather both for myself and for my patients," he said in an interview.

Dr. Kerenyi, the New York abortion expert, who is at Mt. Sinai Hospital, has similar feelings but reaches a different conclusion. "I first of all take pride in my deliveries. But I've seen a lot of bad outcomes in women who did not want their babies—so I think we should help women who want to get rid of them. I find I can live with this dual role."

The legal jeopardy, the emotional strain, the winking neglect with which "signs of life" must be met—all these things nurture secrecy. Late abortions take place "behind a white curtain," as one prosecutor put it, well sheltered from public view.

Only one large-scale study has been done of live births after abortions—by George Stroh and Dr. Alan Hinman in upstate New York from July 1970 through December 1972 (a period during which abortion was legal in New York alone). It turned up 38 cases of live births in a sample of 150,000 abortions.

Other studies, including one that found signs of life in about 10 percent of the prostaglandin abortions at a Hartford, Conn., hospital, date from the mid-1970s. No one is so naive as to think there is reliable voluntary reporting of live births in the present climate, according to Dr. Cates of the Center for Disease Control.

Evidence gathered during research for this story suggests, without proving definitively, that much of the traffic in later abortions now flows to the New York and Los Angeles metropolitan areas, where loose practice more easily escapes notice.

"The word has spread," the Daily Breeze, a small Los Angeles suburban paper, said in July 1980, "that facilities in greater Los Angeles will do late abortions. How late only the woman and the doctor who performs them know."

This kind of thing is disturbing even to some peole with a strong orientation in favor of legal abortion. For instance, the Philadelphia office of CHOICE, which describes itself as "a reproductive health advocacy agency," will recommend only Dr. Kerenyi's service at Mt. Sinai among the half-dozen in New York offering abortion up to 24 weeks. The others have shortcomings in safety, sanitation or professional standards, in the agency's view.

An internal investigation of the abortion unit at Jewish Memorial Hospital in Manhattan, showed that six fetuses aborted there in the summer of 1979 weighed more than 1⅓ pounds. The babies were not alive, but were large enough to be potentially viable. A state health inspector found in June 1979 that the unit had successfully aborted a fetus that was well over a foot long and appeared to be of 32 weeks gestation. Hospital officials confirmed in an interview that later in 1979 a fetus weighing more than four pounds had been aborted.

"It's disconcerting," Iona Siegel, administrator of the Women's Health Center at Kingsbrook Jewish Medical Center in Brooklyn, said of abortions perfomed so late that the infant is viable. When Ms. Siegel hears, as she says she often does, that a patient turned away by Kingsbrook because she was past 24 weeks of pregnancy had an abortion somewhere else, "that makes me angry. Number one, it's against the law. Number two, it's dangerous to the health of the mother."

Though one might expect organized medicine to take a hand in bringing some order to the practice of late abortions, that is not happening.

"We're not really very pro-abortion," said Dr. Ervin Nichols, director of practice activities for the American College of Obstetrics and Gynecology. "As a matter of fact, anything beyond 20 weeks, we're kind of upset about it."

If abortions after 20 weeks are a dubious practice, how does that square with abortion up to 24 weeks being offered openly in Los Angeles and New York and advertised in newspapers and the Yellow Pages there and elsewhere?

"That's not medicine," Nichols replied. "That's hucksterism."

Cates, of the Center for Disease Control, concedes that he has ambivalent feelings about those who do the very late procedures. There is obviously some profiteering and some bending of state laws forbidding abortions in the third trimester. But since late abortions are hard to get legally in many places, Cates puts a low priority on trying to police such practices. Medical authorities leave the late-abortion practitioners to do what they will. And so, too, by necessity, do the legal authorities.

The Supreme Court framed its January 1973 opinion legalizing abortion around the slippery concept of viability. As defined by Justice Harry Blackmun in the landmark *Roe* v. *Wade* case, viability occurs when the fetus is "potentially able to live outside the mother's womb albeit with artificial aid."

The court granted women an unrestricted right to abortions, as an extension to their right of privacy, in the first trimester of pregnancy. From that point to viability, the state can regulate abortions only to make sure they are safe. And only after a fetus reaches viability can state law limit abortion and protect the "rights" of the fetus.

"Viability," Blackmun wrote, after a summer spent researching the matter in the library of the Mayo Clinic, "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."

The standard was meant to be elastic, changing in time with medical advances. Blackmun took no particular account, though, of the possibility of abortion live births, or of errors in estimating gestational age.

In subsequent cases, the high court ruled that:

A Missouri law was too specific in forbidding abortion after 24 weeks. "It is not the proper function of the legislature or the court," Blackmun wrote, "to place viability, which essentially is a medical concept, at a specific point in the gestational period."

A Pennsylvania law was too vague. The law banned abortions "if there is sufficient reason to believe that the fetus may be viable." The court said it was wrong to put doctors in jeopardy without giving them clearer notice of what they must do.

State laws could not interfere with a doctor's professional judgment by dictating the choice of procedure for late abortions or by requiring aggressive care of abortion live births.

According to a 1979 survey by Jeanie Rosoff of Planned Parenthood's Alan Guttmacher Institute, 30 states have laws regulating third-trimester abortions. Some of these laws prohibit or strictly limit abortions after the fetus has reached viability. Some require doctors to try to save abortion live-born babies. Only a few states have both types of laws.

In addition, a number of these laws have been found unconstitutional. Others obviously would be, in light of Supreme Court rulings. Virtually all the state laws would be subject to constitutional challenge if used as the basis of prosecution against an individual doctor.

New York and California, ironically, have among the strongest, most detailed laws mandating care for survivors of abortions. But these laws have proved only a negligible check on the abortion of viable babies.

"We've had a number of claims come up that a baby was born live and full effort was not given to saving it," said Dr. Michael Baden, former chief medical examiner of New York City. "We've not had cases of alleged strangulation (as with Dr. Waddill in California) and that surely must be rare. All [the doctor] has to do is nothing and the result is the same."

Alan Marrus, a Bronx County assistant district attorney, has investigated several live-birth cases and the applicable New York law. He has yet to find "a case that presented us with facts that warranted prosecution. You need an expert opinion

that in fact there was life and that the fetus would have survived. Often the fetus has been destroyed—so there is nothing for your expert witness to examine."

The incidents only come to light at all, Baden and Marrus noted, if some whistle-blower inside the hospital or clinic brings them to the attention of the legal authorities. The credibility of that sort of witness may be subject to attack. And even if the facts do weigh against a doctor, he has some resources left. Almost always he can claim to have made no more than a good-faith error in medical judgment.

"This is happening all over the place" said a California prosecutor. "Babies that should live are dying because callous physicians let them die." But he despairs of winning any convictions. "Nobody's as dumb as Waddill. They're smarter today. They know how to cover themselves."

Unfortunately, advances in medical technique may only aggravate the overall problem. Fetuses are becoming viable earlier and earlier, while the demand for later abortions shows no sign of abating. Some argue that Justice Blackmun's definition of viability as "usually seven months" was obsolete the day it was published. It clearly is now.

A decade ago, survival of an infant less than 3 pounds or 30 weeks gestation was indeed rare, principally because the lungs of smaller infants, unaided, are too undeveloped and fragile to sustain life. Now infants with birth weights of about 1⅔ pounds routinely survive with the best of care, according to Dr. Richard Behrman, chief of neonatology at Rainbow Babies and Childrens Hospital in Cleveland and chairman of a national commission that studied viability in the mid-1970s

Sometimes even smaller babies make it, and the idea that most of them will be retarded or disabled is out-of-date, Behrman said. "Most . . . survive intact."

Even with the medical advances, though, some live-born infants are simply too small and undeveloped to have a realistic chance to survive. A survey last year of specialists in neonatal care found that 90 percent would not order life-support by machine for babies smaller than 1 pound 2 ounces or less than 24 weeks gestation. And on occasion, a newborn may manifest muscular twitches or gasping movements without ever "being alive" according to the usual legal test of drawing a breath that fills the lungs.

Still, it is no longer a miracle for an infant of 24 weeks development (which can be legally aborted) to be saved if born prematurely.

"It is frightening," said Dr. Roger K. Freeman, medical director of Women's Hospital at the Long Beach Memorial Medical Center in Long Beach, Calif. "Medical advances in the treatment of premature babies enable us to save younger fetuses than ever before. When a fetus survives an abortion, however, there may be a collision of tragic proportions between medicine and maternity. Medicine is now able to give the premature a chance that may be rejected by the mother."

In 1970, Freeman developed the fetal stress test, a widely used technique for monitoring the heart rate of unborn fetuses. Also, he and a colleague at Long Beach, Dr. Houchang D. Mondalou, have developed a drug, betamethzene, that matures premature lungs within days instead of weeks. The hospital claims a 90 percent success rate with infants weighing as little as 1 pound 11 ounces.

At the University of California at Irvine, work is used way on an "artifical placenta" that doctors there say could, within five years, push the threshold of viability back even further.

The life-saving techniques are not exclusive to top academic hospitals, either. Good neonatal care is now broadly available across the United States. In fact, the lively issue in medical circles these days is not whether tiny premature babies can be saved, but whether it is affordable. Bills for the full course of treatment of a two-pound infant typically run between $25,000 and $100,000. To some, that seems a lot to pay, especially in the case of an abortion baby that was not wanted in the first place.

The only way out of the dilemma, it would seem, would be for fewer women to seek late abortions. Though some optiomists argue that this is happening, there is evidence that it is not.

Studies show that women seeking abortions late in the second trimester are often young, poor and sexually ignorant. Many either fail to realize they are pregnant or delay telling their families out of fear at the reaction. The patients also include those who have had a change of circumstance or a change of heart after deciding initially to carry through a pregnancy; some of these women are disturbed.

As first-trimester abortion and sex education become more widely available, the optimists' argument goes, nearly all women who choose abortion will get an early abortion. But in fact a new class of older, well-educated, affluent women has now joined the hardship cases in seeking late abortions.

This is because a recently developed technique, amniocentesis, allows genetic screening of the unborn fetus for various hereditary diseases. Through this screening, a woman can learn whether the child she is carrying is free of such dreaded conditions as Downs syndrome (mongolism) or Tay-Sachs disease, a genetic disorder that is always fatal, early in childhood.

The test involves drawing off a sample of amniotic fluid, in which the fetus is immensed in the womb. This cannot be done until the 15th or 16th week. Test cultures for the various potential problems take several weeks to grow. Sometimes the result is inconclusive and the test must be repeated. The testing also reveals the unborn child's sex and can be used to detect minor genetic imperfections.

To many women, particularly those over 35, amniocentiesis seems a rational approach to minimizing the chances of bearing a defective child. A few, according to published reports, go a step further and make sure the baby is the sex they want before deciding to bear the child.

In any case, it is late in the second trimester—within weeks of the current threshold of viability—before the information becomes available on which a decision is made to abort or not abort. The squeeze will intensify as amniocentesis becomes more widely available and as smaller and smaller infants are able to survive.

The abortion live-birth dilemma has caught the attention of several experts on medical ethics, and they have proposed two possible solutions.

The simplest, advocated by Dr. Sissela Bok of the Harvard Medical School among others, is just to prohibit late abortions. Taking into account the possible errors in estimating gestational age, she argues, the cutoff should be set well before the earliest gestational age at which infants are surviving.

Using exactly this reasoning, several European counties—France and Sweden, for example—have made abortions readily available in the first three months of pregnancy but very difficult to get thereafter. The British, at the urging of Sir John Peel, an infuential physician-statesman, have considered in each of the last three years moving the cutoff date from 28 weeks to 20 weeks, but so far have not done so.

But in this country, the Supreme Court has applied a different logic in defining the abortion right, and the groups that won that right would not cheerfully accept a retreat now.

A second approach, advocated by Mrs. Bok and others, is to define the woman's abortion right as being only a right to terminate the pregnancy, not to have the fetus dead. Then if the fetus is born live, it is viewed as a person in its own right, entitled to care appropriate to its condition.

This "progressive" principle is encoded in the policies of many hospitals and the laws of some states, including New York and California. As the record shows, though, in the alarming event of an actual live birth, doctors on the scene may either observe the principle or ignore it.

And the concept even strikes some who do abortions as misguided idealism.

"You have to have a feticidal dose" of saline solution, said Dr. Kerenyi of Mt. Sinai in New York. "It's almost a breach of contract not to. Otherwise, what are you going to do—hand her back a baby having done it questionable damage? I say, if you can't do it, don't do it."

The scenario Kerenyi describes did in fact happen, in March 1978 in Cleveland. A young woman entered Mt. Sinai Hospital there for an abortion. The baby was born live and, after several weeks of intensive care at Rainbow Babies and Childrens Hospital, the child went home—with its mother.

The circumstances were so extraordinary that medical personnel broke the code of confidentiality and discussed the case with friends. Spokeswomen for the two hospitals confirmed the sequence of events. Mother and child returned to Rainbow for checkup when the child was 14 months old, the spokeswoman there said, and both were doing fine.

The mother could not be reached for comment. But a source familiar with the case remembered one detail: "The doctors had a very hard time making her realize she had a child. She kept saying, 'But I had an abortion.'"

How Things Sometimes Go Wrong

Of the various ways to perform an abortion after the midpoint of pregnancy, there is only one that never, ever results in live births.

It is D&E (dilatation and evacuation), and not only is it foolproof, but many researchers consider it safer, cheaper and less unpleasant for the patient. However, it is particularly stressful to medical personnel. That is because D&E requires literally cutting the fetus from the womb and, then, reassembling the parts, or at least keeping them all in view, to assure that the abortion is complete.

Ten years ago it was considered reckless to do an abortion with cutting instruments after the first trimester of pregnancy. Now, improved instruments, more skilled practitioners and laminaria—bands of seaweed that expand when moist and are used to gently dilate the cervix, creating an opening through which to extract fetal parts—allow the technique to be used much later.

D&E is being hailed as extending the safe and easy techniques used for first-trimester abortions (cutting or vacuuming out the contents of the womb) well into the second three months of pregnancy. But there are dissenters. Dr. Bernard Nathanson, formerly a top New York City abortionist, now an anti-abortion author and lecturer, says that D&E "is a very dangerous technique in the hands of anyone less than highly skilled."

Besides, D&E puts all the emotional burden on the physicians. And there are other techniques that allow the doctor, as one physician put it, to "stick a needle in the [patient's] tummy," then leave the patient to deliver the fetus vaginally as in normal childbirth and nurses to assist and clean up.

These more common methods for abortion after the midpoint of pregnancy use the instillation of either saline solution or prostaglandin. In these procedures, some of the woman's nurturing amniotic fluid is drawn out of the womb by an injection through her belly and is replaced with the abortion-inducing drug. (The amount of fluid in the womb is kept relatively constant to make sure the womb does not rupture.)

The two instillation substances work in different ways. Saline solution poisons the fetus, probably though ingestion, though the process is not completely understood. Usually within six hours, the fetal heartbeat stops. At the same time, the saline induces labor, though supplemental doses of other labor-inducing drugs often are given to speed this effect.

Prostaglandin, on the other hand, is a distillate of the chemical substance that causes muscles to move. It is thought not to affect the fetus directly but instead is potent at inducing labor. Fetal death, if it does occur, is from prematurity and the trauma of passage through the birth canal.

Each substance also has an undesired side effect. Saline, an anti-coagulant that increases bleeding, can make minor bleeding problems more serious and in rare cases even cause death. Prostaglandin, because it causes muscles to contract indiscriminately, was found to cause vomiting and diarrhea in more than half the patients in early tests. Claims that it causes fewer major complications, which made it preferred to saline by many in the mid-1970s, have now been questioned. And the high incidence of live births (40 times more frequent than with saline, according to one study) also has lessened its popularity.

But saline is not foolproof either in preventing live births. Dr. Thomas F. Kerenyi of Mt. Sinai Hospital in New York, the best-known researcher on saline abortions, said most live births result from "errors in techniques"—either administering too small a dosage or getting some of it into the wrong part of the womb.

A wrong estimation of gestational age can cause either a saline or prostaglandin abortion to fail. A larger-than-expected fetus might survive the trauma of labor or might reject a dose of saline (or urea, a third instillation substance sometimes used).

And on the basis of physical examination alone, studies show, doctors miss the correct gestational age by two weeks in one case out of five, by four weeks in one case out of 100, and sometimes by more than that. Pregnancies can be dated more exactly by a sonogram, a test that produces an outline image of the fetus in the womb, but because of its cost (about $100) many doctors continue to rely on physical exams.

There is one other abortion technique, hysterotomy, but it is the least desirable of all from several points of view. Because it is invasive surgery (identical to a Caesarean section), it has a much higher rate of complication than do the installation techniques. Usually done only after attempts to abort with saline have failed, it has the highest incidence of all of live births.

As the infant is lifted from the womb, said one obstetrician, "he is only sleeping, like his mother. She is under anesthesia, and so is he. You want to know how they kill him? They put a towel over his face so he can't breathe. And by the time they get him to the lab, he is dead."

Over the years, the chief criterion in choosing between abortion methods has been safety for the patient. Advocates of D&E contend that bleeding, perforation of the uterus and infection all occur less frequently with D&E than with other methods. Dr. Willard Cates of the Center for Disease Control in Atlanta prefers D&E. Because it can be done—unlike instillation—in the early part of the second trimester, he has said, the need for as many as 80 percent of the very late abortions could be eliminated.

How very late are abortions performed?

His own clinic at Mt. Sinai, Dr. Kerenyi said, screens patients closely to make sure they are not past the legal 24-week limit. But in theory, he said, there is nothing to prevent successful saline abortions from being performed "virtually all the way to birth. At 30 weeks, say, you would just have to draw off and inject that much more of the solution."

Most practitioners who were interviewed say they stop doing D&E at 18 to 22 weeks. But again, there appears to be nothing to prevent the technique from being used much later.

"You can do it, you can do it," an abortionist, who would talk only if not quoted by name, said of D&Es late in pregnancy. "Some son-of-a-bitch misreads a sonogram and sends me a woman 26 weeks. I've done it. You've just got to take your time and be careful. And you're not going to end up with a live birth."

"I Stood By And Watched That Baby Die"

Nurses are the ones who bear the burden of handling the human-looking products of late abortions. And when an unintentional live birth occurs, they are the first to confront the waving of limbs and the gasping.

Reluctant to talk about their experiences, most of those interviewed for this article did not want their names to be published, and out of professional loyalty, they did not even want their hospitals to be named.

They spoke of being deeply troubled by what they have seen of late abortions in American hospitals.

Linda is a nurse in her late 50s in Southern California. Hurrying out of a patient's room one day to dispose of the aborted "tissue," as nurses were taught to think of it, she felt movement. Startled, she looked down, straight into the staring eyes of a live baby.

"It looked right at me," she recalled. "This baby had real big eyes. It looked at you like it was saying. 'Do something—do something.' Those haunting eyes. Oh God, I still remember them."

She rushed the 1½-pound infant to the nursing station. She took the heart rate—80 to 100 beats a minute. She timed the respirations—three to four breaths a minute. She called the doctor.

"I called him because the baby was breathing," Linda said. "It was pink. It had a heartbeat. The doctor told me the baby was not viable and to send it to the lab. I said, 'But it's breathing' and he said, 'It's non-viable, it won't be breathing long—send it to the lab.' "

She did not follow the order. Nor did she have resources at her command to provide any life-saving care. Two hours later the infant died, still at the nursing station, still without medical treatment. It died in a makeshift crib with one hot-water bottle for warmth and an open tube of oxygen blowing near its head.

The nursing supervisor, Linda said, had refused to let her put the baby in the nursery, where there was equipment to assist premature babies in distress. "She said to follow the doctor's orders and take it to the lab. I kept it with me at the station. We couldn't do an awful lot for it."

This happened eight years ago, in 1973, but Linda is still upset. "I stood by and watched that baby die without doing a thing," she said. "I have guilt feelings to this day. I feel the baby might have lived had it been properly cared for."

Jane, about 50, is the head floor nurse in an Ohio hospital. She and her fellow nurses successfully petitioned their hospital in 1978 to stop doing late abortions. Twice before that, she witnessed live births after abortions.

She recalls vividly the 16-year-old patient who phoned her mother after her abortion and and said in an agonized voice, "Ma, it's out—but Ma, it's alive."

That happened in 1975. Jane still speaks of it bitterly, her eyes flashing anger.

A year earlier Jane saw the second abortion live birth in her experience. "I was called by the patient's roommate," she recalled. "When I got there the baby's head was sticking out and its little tongue was wiggling. Everybody felt they couldn't do anything until they called the doctor. It was a little thing—it only lasted about 15 minutes. But it was alive, and we did nothing. And that was wrong."

It rankles, too, that she was routinely forced to handle dead fetuses, the size and shape of well-formed premature babies.

"Because of my position," she said, "I had to pick them up off the bed and put them in a bottle of formalin [a preservative fluid]. Sometimes you had to have a very large container. Our gynecologists seemed to have a very poor ability to estimate gestational age. Time and again they would say with a straight face, 'This woman is 20 weeks pregnant' when she was actually 26 weeks."

Norma Rojo, about 35, is an obstetrical nurse at Indio Community Hospital in Indio, Calif. She was present the night of May 3, 1980, when a 15-year-old patient delivered a live baby girl after a saline abortion.

"Get rid of it" the patient cried hysterically. "I'm sorry. Mama—get rid of it," she said, the baby alive, kicking and crying between her legs.

Two weeks earlier the girl had been in a traffic accident that killed four others and had sought the abortion out of fear that her baby might be damaged.

The fetus, which in tests had shown a normal heartbeat of 132 to 136 in the womb, appeared healthy at birth. "She was beautiful." said Mrs. Rojo. "She was pink. There were no physical deformities. She let out a little lusty cry. She lay in a basin put there to catch all the stuff. She was waving her arms and legs. You could tell she was making a big effort to live."

The nurses cut the umbilical cord, wrapped the infant in a blanket and took her to the intensive care nursery. She was put in an isolette (a life-support system) within minutes and was given oxygen.

Acting on their own, the nurses had the 1 pound 14 ounce baby transferred six hours later to Loma Linda University Medical Center, one of several hospitals in the Los Angeles area specializing in the care of very small premature infants. Four days later the baby was reported stable but had developed a complication causing hemorrhaging of the brain. Dr. David Deming of Loma Linda said then that its chances were only 50-50. He added, though, that the abortion had done little damage. "I would say there is probably no effect on her from the saline."

Eleven days after birth, the baby died. Family members indicated they were upset by the nurses' effort to save it.

"After this experience," Rojo said, "my friend [another nurse] and I are changed. We realize doctors aren't perfect. . . . I hope this is the last [abortion live birth] I ever see, but if there are any more, we will do the same thing."

The CHAIRMAN. Are there any other questions of these witnesses by any member of the committee?

[No response.]

ABORTION NOT MENTIONED IN CONSTITUTION

The CHAIRMAN. I want to say this on the subject of abortion. Abortion is not mentioned in the Constitution of the United States. This field was never delegated by the States to the Union at the time the Constitution was written or by any amendment since the adoption of the Constitution.

Therefore, I do not hesitate to say that in my judgment the Supreme Court had no jurisdiction in entering the field of abortion. In my opinion that field is reserved to the States under the Constitution, but they went into it anyway. They not only went into it, they have written a law on it, practically, as you have stated here today.

Now, however, the testimony of Judge O'Connor as I recollect it was that she stated how she voted on these matters back yonder, and then after that the question of abortion became, if you want to call it, a hotter question, a question more timely and it has received a lot more consideration.

She did not answer about how she would vote on that question because, if she had done that, then she would disqualify herself from voting as a member of the Supreme Court on that question, when it comes before it, if it does. She said she anticipated it would come before the Supreme Court.

Therefore, I wanted to just bring out that point, that I do not think she could be censured necessarily for not saying how she would vote as a member of the Supreme Court on abortion because she would disqualify herself from voting on that question if it does come before the Supreme Court again.

I want to thank you witnesses here today, Dr. Willke and Dr. Gerster both. You have made a very fine impression on the members of the committee here, I am sure, and we thank you for your appearance.

Dr. WILLKE. It has been a real honor, Senator. Thank you for the privilege.

Dr. GERSTER. Thank you for the opportunity to say the things that we had to say.

[Material follows:]

Testimony of
Carolyn Gerster, M.D.
Before the
Senate Judiciary Committee
September 10, 1981

I would like to thank Sen. Strom Thurmond and the members of the Senate Judiciary Committee for the opportunity to testify at this confirmation hearing.

I am an Arizona physician and was the co-founder and first president of the Arizona Right to Life Committee in October of 1971. I have served as director from Arizona to the board of directors of the National Right to Life Committee since its formation in 1973 and am the immediate past president of the national organization. My current position is Vice President in charge of International Affairs.

I would like to comment on the Justice Department memorandum from Kenneth W. Starr, dated July 7, 1981, summarizing his July 6th telephone investigation of Judge Sandra D. O'Connor's voting record on family-related issues during the period that she served in the Arizona State Senate. The memo reads in part: "Judge O'Connor further indicated, in response to my questions, that she had never been a leader or outspoken advocate on behalf of either pro-life or abortion-rights organizations. She knows well the Arizona leader of the right-to-life movement, a prominent female physician in Phoenix, and has never had any disputes or controversies with her."

I was not contacted by the Justice Department for verification. This statement has been understandably misunderstood by members of the legislature and media to imply that Judge O'Connor and I share similar beliefs on the abortion issue.

I have known Sandra Day O'Connor since 1972. She is a

gracious and a gifted lady. Quite apart from our social contact, however, we were in an adversary position during 1973 and 1974 due to Senator O'Connor's position on abortion-related legislation while she served as Senate majority leader.

The Justice Department memorandum is misleading and incomplete regarding Senator O'Connor's voting record from 1970 through 1974.

All of her votes cast on abortion-related bills during this period have been consistently supportive of legalized abortion with the possible exception of S.B. 1333 which allows physicians, medical personnel, and hospitals the right to refuse to participate in abortion procedures on moral or religious grounds. The bill was actually more related to freedom of conscience than to abortion, per se. The memo neglects to point out that S.B. 1333 passed unanimously (30 to 0) in the Senate, supported by those on both sides of the abortion debate.

In 1970, H.B. 20 proposed to remove all restrictions from abortions done by licensed physicians without regard to indication or duration of pregnancy. This bill, predating the 1973 Supreme Court decision by three years, would, if enacted, have allowed abortion on request to term, a radical concept even when compared to the most permissive of existing state laws in New York.

The Justice Department memo states that, "There is no record of how Senator O'Connor voted, and she indicated that she has no recollection of how she voted."

An article by Howard E. Boyce, Jr., appearing in the Arizona Republic on April 30, 1970, records the vote of all nine members of the Senate Judiciary Committee. Sen. O'Connor is recorded as casting one of the six votes for the bill, as she did in the Senate Rules Committee where the bill later failed to pass (Arizona Republic, May 1, 1970).

There were no votes cast by Senator O'Connor in 1971, as the two proposed abortion bills, H.B. 51 and S.B. 123, were sent

to the Senate Public Health and Welfare Committee where they failed to pass.

In 1972, no abortion-related legislation was introduced, as the legislative route was abandoned by abortion advocates in favor of the judiciary. (The Arizona abortion law was upheld as constitutional on appeal).

In 1973, Senator O'Connor co-sponsored the Family Planning Act (S.B. 1190) which, as originally worded, would have furnished "all medically acceptable family planning methods and information to anyone regardless of age," without parental consent. A state or county physician could refuse to provide "service" on "medical grounds."

The Justice Department memo states that, "The bill made no express mention of abortion and was not viewed by then Senator O'Connor as an abortion measure.... She recalls no controversy with respect to the bill and is unaware of any hearings on the proposed measure."

In 1973, abortion certainly was regarded by many as a "medically acceptable method of family planning" and was so regarded by several state senators as well as the Arizona Republic (see attached Senate Public Health and Welfare minutes and Arizona Republic editorial of March 5, 1973).

S.B. 1190 passed Public Health and Welfare Committee but was held up in Rules Committee. Contrary to the Justice Department memo, hearings were held and the bill certainly was regarded as controversial.

On May 9, 1974, Senator O'Connor was one of nine senators voting against S.B. 1245 after an amendment had been added in the House "prohibiting certain abortions at educational institutions under jurisdiction of the board of regents." Senator O'Connor's vote is explained in the memo as being "on the ground that the Arizona Constitution forbade enactment of legislation treating unrelated subject matters... Her reasons for so voting are nowhere stated on the record."

In the August 1981 "First Monday," the publication of the Republican National Committee, and in a August 3rd letter from the White House to Mrs. Marie Craven of Chicago, Illinois, S.B. 1245 was cited as the only example of Mrs. O'Connor's voting record on abortion-related subjects. The letter erroneously stated that the bill was "turned down" by the Senate because the amendment was unrelated. Actually, S.B. 1245 passed 20 to 9, with one member absent. The amendment was not ruled to be non-germaine.

The most important piece of pro-life legislation is totally omitted from Mr. Starr's memorandum.

In 1974, after a rally of over 10,000 Arizonans and the submission of 35,000 names of registered voters favoring the measure, House Memorial 2002 passed the Arizona House of Representatives by a 41 to 18 vote. The memorial would have petitioned the U.S. Congress to pass a Human Life Amendment to the Constitution restoring legal protection to the unborn child except where the mother's life was in jeopardy.

H.B. 2002 passed the Senate Judiciary by a 4 to 2 vote. Sandra O'Connor is reported in the April 23, 1974, Phoenix Gazette as voting against it even after amended to include rape and incest in addition to life of the mother.

On May 7, 1974, a Phoenix Gazette article quoted Sandra O'Connor as follows: "I'm working hard to see to it that no matter what the personal views of people are, the measure doesn't get held up in our caucus." On May 15, 1974, H.R. 2002 failed to pass the majority caucus by one vote. Sen. Trudy Camping, a member of the Caucus, has submitted a notarized statement that Sen. O'Connor voted against the memorial.

The President's personal assurance to me on January 17, 1980, at the Hilton Hotel in Rye, New York, was reiterated in the 1980 Republican platform, as "We will work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life."

I realize that there are some members of the Senate who do not share our beliefs that abortion is the most basic of all civil rights.

There is, however, general agreement that misrepresentation, evasion, and distortion of fact do a disservice to the selection of a justice to the nation's highest court.

I have every confidence that this committee will make a full investigation of this deeply flawed and seriously misleading Justice Department memorandum.

Testimony of
John C. Willke, M. D.

September 10, 1981
Senate Judiciary Committee

I am here to speak for the National Right to Life Committee. Our organization is composed of the fifty state right-to-life organizations which contain almost 2000 active chapters and an estimated membership in the millions.

We are concerned.

We exist as a movement because of the 1973 Roe v. Wade decision of the U.S. Supreme Court. Just as the Dred Scott decision of 1857 was the civil rights outrage of that century, so we see Roe v. Wade as a similar blot upon our nation in this century. In Dred Scott, the Supreme Court ruled that an entire class of living humans were chattel. This decision denied Black Americans equal protection by law.

Let us flash back in time to the post-Civil War era, and ask a question. Suppose a nominee to the U.S. Supreme Court was being questioned and his qualifications examined. Suppose that person, as a legislator, had previously voted for the continuation of slavery, not once but twice. Suppose also that he had voted against a memorial resolution asking the Congress to pass a constitutional amendment to abolish slavery, again voting for this discrimination not once but twice.

87-101 O—81——22

Would it not be a proper question to inquire whether that nominee still held to his pro-slavery convictions?

We believe so. We also believe that if such earlier actions were not totally repudiated by that nominee, that nominee would be disqualified from sitting on the Supreme Court.

A century has passed. Another Supreme Court, by a similar 7-2 decision, ruled (in Roe v. Wade) that another entire class of living humans were to be reduced to the status of property of the "owner" (the mother). Further, the mother was given a newly created "right to privacy," a right that allowed her to destroy that property--her unborn child--if she wished.

Because of this ruling and because of the Court's interpretation of the word "health," we have seen the body count of unborn babies climb to its present level of 1½ million annually.

There are indeed some "single issues" which are so fundamental that they ought to be weighed very heavily in considering any lifetime appointment to the federal bench--among these, racial justice. In 1948 G. Harrold Carswell gave a speech in which he said, "I believe that segregation of the races is the proper and the only practical and correct way of life in our states." During Senate consideration of his nomination to the U.S. Supreme Court 22 years later, Judge Carswell completely repudiated this position. Yet this matter weighed heavily upon the minds of many senators, and quite properly so. Concern over Carswell's commitment to racial justice played an important role in the rejection of his nomination.

We believe that recognition of the right to life of unborn children is, likewise, a fundamental issue. Those who do not recognize this fundamental right should be considered disqualified for the federal bench.

A nominee sits before this distinguished body, which will decide whether she is qualified to sit upon the U. S. Supreme Court. There are serious questions to ask. Her record as a state legislator is disturbing.

In 1970, Mrs. Sandra O'Connor was a state senator in Arizona. Only one-third of the states had legalized abortion, most laws being highly restrictive. New York had just legalized abortion-on-demand until 24 weeks, and was to be the second last state to legalize abortion by statute. Thirty-three states were to vote on such proposed laws and to defeat them. The nation had been shocked by the radical New York law and had already read of babies surviving abortion attempts.

In this climate, Senator O'Connor voted for a bill that would have legalized abortion-on-demand in her state for the entire nine months of pregnancy. No statute remotely as radical had been seriously considered elsewhere.

This was not a casual vote on the floor during a busy legislative session. We can all understand how, in the push of a busy session, a lawmaker can at times vote without full knowledge of a bill's dimensions, and we can certainly understand how one might not always remember such a vote.

But Senator O'Connor was a member of the Judiciary Committee that had studied the bill. Hers was no casual action. Clearly, it was a deliberate vote cast with full awareness of the reach of that legislation. Furthermore, she voted for the bill a second time in a later caucus.

A few weeks ago, the nation was informed through the "Starr Memo" that Mrs. O'Connor did not remember her votes on this bill.

As events transpired, the Supreme Court in 1973 actually legalized abortion through the entire nine months of pregnancy. In 1974, the Arizona House of Representatives, by a wide margin, passed a memorialization resolution calling upon Congress to reverse that radical abortion ruling through a Constitutional Amendment.

Once again Senator O'Connor, as a member of that state's Judiciary Committee, had the issue placed before her. Once again, by voting against that resolution (even after it was amended to

exclude cases of rape and incest), Mrs. O'Connor placed herself in favor of abortion, essentially on-demand, through the ninth month of pregnancy. Again, she repeated her pro-abortion vote in caucus.

But Mrs. O'Connor has more recently stated that she is "personally opposed" to abortion. I have never met an abortion clinic operator or an abortionist who was not "personally opposed." The simple fact is that such a statement often is totally meaningless as an indicator as to how such a person views abortion for others.

There is another important point. The Supreme Court's 1973 abortion decisions had no authentic basis in the Constitution. Rather, they constituted the most extreme examples of "judicial activism" by the Supreme Court which we have seen in this century--"an exercise in raw judicial power," as Justice Byron White said in his dissent to Roe v. Wade. Even many "pro-choice" legal scholars recognize that these decisions were without constitutional foundation.

Completely aside from the question of whether or not Mrs. O'Connor personally believes that abortion should be legal or not, it is essential that the Judiciary Committee determine how she views the constitutionality of the Supreme Court's abortion decisions. If O'Connor regards the 1973 abortion decisions as constitutional decisions, and as binding precedents, then she is not in fact a judicial "constructionist," and her nomination should be rejected for that reason alone.

We recognize the possibility that a person might state that she was "personally opposed," that she might favor permissive abortion laws, but at the same time could still view Roe v. Wade as seriously flawed, an unwarranted exercise of "raw judicial power," and an unconstitutional decision that must be reversed. If in fact such was the case, we would be pleased to reevaluate our position of opposition to her appointment.

In closing, I must say that the lady sitting next to me (Dr. Carolyn Gerster) is probably no more or less perfect than the rest of us. She undoubtedly has her faults. One fault that she does not have, however, and none of us who know her could even conceive of her having, is that of being "vindictive."

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APPENDIX

1. Article from the Arizona Republic (April 30, 1970), reporting that Sen. Sandra O'Connor voted for HB 20 to legalize all abortions performed by a physician. (The bill later died in the Senate Rules Committee.)

2. Text of SB 1190, a 1973 bill to promote "family planning" which O'Connor co-sponsored.

3. Editorial opposing O'Connor's family planning bill (Arizona Republic, March 5, 1973), warning that the bill appeared to have no purpose "unless energetic state promotion of abortion is the eventual goal."

4. Page from Senate committee minutes, supporting contention that SB 1190 would have included abortion.

5. Arizona Senate Journal pages showing votes pro and con on 1974 measure to prohibit abortions at the University of Arizona hospital except to save the life of the mother (SB 1245).

6. Text of the restriction attached to SB 1245.

7. Text of 1974 House Memorial 2002, calling for Congress to enact a Human Life Amendment.

8. Phoenix Gazette article (April 23, 1974) reporting O'Connor's vote against HM 2002 in the Senate Judiciary Committee; Phoenix Gazette article (May 7, 1974) in which O'Connor claims to oppose blocking HM 2002 in the GOP Senate Caucus; and Phoenix Gazette article (May 15, 1974)charging the GOP Senate Caucus with blocking HM 2002.

9. Notarized statement by former Arizona State Senator Trudy Camping, stating that O'Connor voted against HM 2002 in Caucus.

10. Justice Department memo written on July 7 by Kenneth Starr.

[From the Arizona Republic, Apr. 30, 1970]

ABORTION BILL CLEARS SENATE JUDICIARY PANEL

(By Howard E. Boice, Jr.)

A long-dormant bill to legalize abortions cleared the Senate Judiciary Committee over the objections of its chairman yesterday and moved to Rules Committee, where it could be voted on today.

The bill, which passed the House Feb. 26, would remove all legal sanctions against abortions performed by licensed physicians.

It was the first time the measure appeared on the Judiciary Committee agenda. It passed by a 6 to 3 vote.

Chairman John Conlan, R-Maricopa, and Sens. Dan Halacy, R-Maricopa, and James F. McNulty, D-Cochise, voted against the bill.

Sens. Chris Johnson, R-Maricopa, Harold C. Giss, D-Yuma, Michael Farren, R-Maricopa, David B. Kret, R-Maricopa, James F. Holley, R-Maricopa, and Sandra O'Connor, R-Maricopa, voted in favor of the measure.

The Judiciary Committee also approved bills to establish a division of children's services in the State Welfare Department, to permit courts to remove a felony conviction from the record of a defendant believed to have been rehabilitated, to overhaul initiative and referendum procedures and to stop the prosecution of persons now subject to criminal charges for acts of self-defense.

The Senate, meanwhile, passed and sent to the House bills to permit creation of metropolitan transit authorities with the power to levy taxes to cover operating losses and to issue revenue bonds up to $2 million for capital outlay, and to establish a nine-member commission on judicial qualifications with the power to recommend removal of incompetent judges.

Also, the Senate Appropriations Committee reversed an earlier action and voted 6 to 4 for $2.75 million to build a maximum security facility at the Arizona State Hospital. The committee had killed a similar bill earlier this session.

The Appropriations Committee also approved a bill to provide state aid for public school kindergartens.

Several members of the Senate, both Republican and Democrat made floor speeches yesterday condemning what they termed political motivation behind recent attacks on the welfare department by Rep. Frank Kelley, R-Maricopa, and Rep. Burton S. Barr, R-Maricopa.

Sen. E. B. Thode, D-Pinal, contended that Kelley had used a directive by an interim committee of which has was chairman to spend $20,000 for a welfare department "study" that he released before having committee approval.

She termed the study and subsequent statements by Kelley and Barr about the report a "witch hunt" directed at Welfare Commissioner John O. Graham.

Sen. Boyd Tenney, R-Yavapai, said Kelley was using the report, prepared by Prof. Edmund Mech of Arizona State University, as a "vendetta."

In another matter, Barr and House Speaker John Haugh, R-Pima, were accused by Sen Dan Halacy, R-Maricopa, of engineering the "execution" in the House of a bill that would have lowered the presumptive level of drunkenness from .15 per cent blood alcohol to .10.

". . . Speaker John Haugh decreed the fate of Senate Bill 147," Halacy stated. "and majority leader Burt Barr was the Lord High Executioner."

"It is clear to me, and to many who are more expert in these matters than I," Halacy added, "that .10 per cent is a needed change. Why did the House leadership kill it?"

S.B. 1190—STATE OF ARIZONA, 31ST LEGISLATURE, 1ST REGULAR SESSION—SENATE

Introduced by Senators Holsclaw, Alexander, Baldwin, Corbet, O'Connor, Giss, Felix, Ulm, Awalt, Hardt.

An act relating to public health; providing family planning methods, and amending title 36, chapter 6, Arizona Revised Statutes, by adding article 4.1.

Be it enacted by the Legislature of the State of Arizona:

SECTION 1. Legislative declaration: The legislature finds and declares that it is desirable for the health, welfare and economy of this state that persons desiring and needing family planning information and methods shall have access thereto without inhibitions or restrictions.

SEC. 2. Title 36, chapter 6, Arizona Revised Statutes, is amended by adding article 4.1, sections 36-681 through 36-687, to read:

ARTICLE 4.1. FAMILY PLANNING

36-681. Definitions

In this article, unless the context otherwise requires:

1. "Commissioner" means the Commissioner of the Department of Public Health.
2. "Department" means the State Department of Health.
3. "Physician" means a doctor of medicine or doctor of osteopathy licensed to practice in this State.

36-682. Policy; authority and prohibitions

A. All medically acceptable family planning methods and information shall be readily and practicably available to any person in this State who requests such service or information, regardless of sex, race, age, income, number of children, martial status, citizenship or motive.

B. A hospital, clinic, medical center, pharmacy, agency, institution or any unit of local government shall not have any policy which interferes with either the physician-patient relationship or any physician or patient desiring to use medically acceptable family planning procedures, supplies or information.

C. Dissemination of medically acceptable family planning information in State and county health departments, State and local welfare offices and at other agencies and instrumentalities of the State is consistent with public policy.

D. This article does not prohibit a physician from refusing to provide family planning methods or information for medical reasons.

E. A private institution or physician or any agent or employee of such institution or physician may refuse to provide family planning methods and information and no such institution, employee, agent or physician shall be held liable for such refusal.

36-683. Furnishing services to minor

A physician may furnish family planning services to a minor who in the judgment of the physician is in special need of and requests such services. The consent of the parent, parents or legal guardian of the minor is not necessary to authorize such family planning service.

36-684. Performing surgery

A physician may perform appropriate surgical procedures for the prevention of conception upon any adult who requests such procedure in writing.

36-685. Duties, powers of department

A. In order that family planning services shall be available to persons, the department may receive and disburse such funds as may become available to it for family planning programs.

B. For the purpose of providing services pursuant to subsection A, the department may contract with physicians or organizations, public or private, engaged in providing family planning methods and information.

36-686. Acceptance of funds

The department may accept public or private funds, grants or donations in aid of any program authorized by this article.

36-687. Rules, regulations

The commissioner may adopt and issue rules and regulations necessary to enable the department to implement the provisions of this article.

[From the Arizona Republic, Mar. 5, 1973]

EDITORIAL: "DANGERS OF VAGUE BILL"

The family planning bill being considered by the Arizona Senate, S.B. 1190, is inexcusably vague, precisely the sort of measure to lead to agonies of judicial interpretation.

At the Senate Public Health and Welfare Committee's meeting scheduled today, members should give closer attention to a bill they've already revised slightly because of uncertain language.

The bill says that "all medically acceptable family planning methods and information" should be furnished to anyone in Arizona seeking them, "regardless of sex, race, income, number of children, marital status, citizenship or motive."

Regardless of motive? Is a prostitute to be guaranteed state contraceptives for her job?

Regardless of citizenship? Is a tourist state such as Arizona to dole out contraceptives to every visitor from near and far who demands them?

Regardless of marital status? Obviously, the new morality.

The original wording also said regardless of age, but some senators apparently realized this could mean the state must approve the facilitation of statutory rape.

In addition, the bill says that a physician can refuse to provide family planning methods or information "for medical reasons." Medical, but not moral.

While the legislature may feel itself inadequate to decide questions of family planning morality, it should recognize that physicians don't uniformly approve encouraging sexual relations under every circumstance, even if medically acceptable.

The bill does add that private institutions, physicians, and their employees shouldn't be held liable for refusing to supply the information and methods, although these are treated as every citizen's right. But if they are automatically a right, could they be legally withheld?

Late last year in Montana, a judge ordered a Catholic hospital to sterilize a woman because she considered it her right, even though the hospital and staff objected.

Perhaps the most important question, however, has been raised by Sen. John Roeder who, as even he describes himself, is not the most antiabortion member of the legislature.

He fears the vagueness of the bill's reference to "all medically acceptable family planning methods" could positively put the state into the business of encouraging abortions.

Only a decade ago, family planning was commonly accepted as referring to contraception, but contraception was sharply differentiated from abortion even by family planning's faithful boosters.

But now the abortion front has developed dishonest terminology in which abortion isn't even described as "interruption of pregnancy" but "post-conceptive family planning."

Planned Parenthood used to be distressed by people who believed contraception was murder, just like abortion. Yet now PP often blurs the distinction even more terribly.

Rather than inhibiting abortion, as some unwise supporters of the bill contend, it might make it more widespread.

Why, indeed, is this bill proposed? The state certainly has no policy of discouraging contraception. The bill appears gratuitous—unless energetic state promotion of abortion is the eventual goal.

Minutes From March 5, 1973 Hearing

Senator Runyan moved to insert the words "required by a licensed practical nurse in this state." On line 2, page 5, after the word "qualifications" and then strike the remainder of the section; the motion carried. He then moved to insert the words "for a license" on line 10, after the word "applicant" and on line 11 after the words "meets" to strike the remainder of the section and insert "the qualifications for licensing specified in Section 32-1637."; the motion carried.

Senator Runyan then moved the bill be returned to the Senate with a do pass recommendation as amended, the motion carried. Senator Roeder voted no and requested a minority report.

SB 1190—FAMILY PLANNING

This bill had been discussed at the previous meeting and some amendments had been made. Senator Runyan asked what the status of the bill was at this point. The chairman stated that copies of the amendments considered at the last meeting were ready for each member but that they would have to be considered again. Senator Runyan moved the bill for purpose of amendments. He then moved to strike lines 2 through 6 on page 1.; on page 2, line 2, strike "AGE" and on line 9, strike "IN" and insert "BY"; on line 10, after "OFFICES" insert a period and strike remainder of line and strike line 11.

Senator Roeder stated that the editorial appearing on the morning Republic (2/5/73) stated far better than he could that the bill before the Committee was useless; that since the Supreme Court had ruled on Abortion it was not a legislative problem but a legal problem and that presently abortion was a perfectly proper form of family planning.

Senator Corbet stated he hoped the members were not equating abortion with birth control as that was not his understanding of the bill. He did not favor abortion but felt this bill was an attempt to change some of the practices of the past whereby birth control information was not available. He further stated that his vote killed the abortion bill in Committee two years ago and he still feels the same way but sees a difference in the Supreme Court Ruling and this bill before the Committee. He stated the Legislature should be one of action and not reaction. He also stated that while he did not wish to court trouble with the Arizona Republic he did not agree with their article in the morning paper.

Senator Alexander stated that the Federal Government (Health Education & Welfare) has already issued guide lines for block grants and that family planning plays a big part and this should be considered as Arizona will be affected eventually. He stated that he felt the time has come when the Committee should adopt a statewide program providing for limited family planning. He stated he does not advocate the State providing abortions.

Senator Runyan moved an amendment to his original amendment on page 2, line 2, strike "OR MOTIVE". A vote was taken on the entire amendment and carried.

Senator Runyan moved to amend the bill on page 2, line 19, after "SERVICES" insert ", EXCLUSIVE OF SURGICAL PROCEDURES EXCEPT WHERE REQUIRED FOR DIAGNOSIS". This motion carried with Senators Camping and Roeder voting no.

Senator Runyan moved to amend on line 21 after "PARENT" by inserting the words "IS OBTAINED" and striking the remainder of the paragraph.

Mr. William Carter of Maricopa County Health Dept. and Mr. Joe Davis of Phoenix Planned Parenthood both spoke against this amendment.

Senator Roeder stated the amendment would do away with the basis of the bill and that is why he felt the Committee should put the bill aside and re-do it in order to have something the people of Arizona could live with.

Dr. William Russell stated it was the minors they were trying to help and the need was now.

Senator Runyan stated he was aware of the problem but that he had a moral problem in that he felt the bill was one more step in breaking down the family unit and he could not see taking control of minors away from the parents.

Senator Corbet stated he felt very strongly about the family as a unit but that something had to be done. Dr. Russell stated that the minors most doctors were seeing had already strayed and that it was not the family that got pregnant. Senator Camping stated that maybe these youngsters had never heard that it was wrong.

Senator Guteirrez stated that the amendments being offered in the bill were not going to change the family situation, those parents with control of their children would still have control. Dr. William Moore said the Committee might want to substitute the word "contraceptive" for family planning. Father M. Calegari called attention to two contraceptives already on the market.

Senator Alexander offered a substitute motion to Senator Runyan's, to insert the words "DESIRABLE WHERE POSSIBLE BUT" on line 22, after the word "IS.", this motion carried with Senator Runyan and Camping voting no.

JOURNAL OF THE SENATE, THURSDAY, MAY 9, 1974, ONE HUNDRED SIXTEENTH DAY

Ayes 29: Alexander, Baldwin, Camping, Corbet, Ellsworth, Felix, Gabaldon, Gutierrez, Hardt, Holsclaw, Hubbard, Koory, Kret, Lena, Mack, McNulty, O'Connor, Osborn, Roeder, Rottas, Runyan, Stinson, Strother, Strump, Swink, Tenney, Turley, Ulm, President Jacquin.

Not voting 1: Pena.

House Bill 2079 was signed in open session with the emergency and returned to the House.

HOUSE BILL 2116

An Act relating to education; defining the rights of parents and guardians of school children to examine pupil records; providing for certain filing of transcript of change of boundaries of new school districts, and amending title 15, Arizona Revised Statutes, by adding chapter 1.1.

Ayes 26: Baldwin, Camping, Corbet, Ellsworth, Felix, Gabaldon, Gutierrez, Hardt, Holsclaw, Hubbard, Koory, Lena, Mack, O'Connor, Osborn, Roeder, Rottas, Runyan, Stinson, Strother, Stump, Swink, Tenney, Turley, President Jacquin.

Noes 3: Alexander, McNulty, Ulm.

Not voting 1: Pena.

House Bill 2116 was signed in open session with the emergency and returned to the House.

SENATE BILL 1245

An Act relating to education; prescribing certain additional powers and responsibilities of the board of regents relating to educational institutions; authorizing the Arizona Board of regents to remodel the stadium at the University of Arizona and acquire, construct, equip, furnish and maintain an addition thereto and enter into projects for other purposes for which revenue bonds may be issued by the board of regents for any of the universities, and for those purposes to accept gifts, to borrow money and issue bonds, to refund bonds heretofore and hereafter issued for such educational institutions, to provide for the payment and security of all bonds issued hereunder, and to perform necessary or convenient acts in connection with such projects; superseding inconsistent provisions of all other laws; prohibiting certain abortions at educational institutions under jurisdiction of board of regents; amending title 15, chapter 7, article 2, Arizona Revised Statutes, by adding section 15-730, and declaring an emergency.

Ayes 20: Camping, Corbet, Ellsworth, Gabaldon, Hardt, Hubbard, Koory, Lena, Mack, McNulty, Osborn, Rottas, Runyan, Stinson, Strother, Swink, Tenney, Turley, Ulm, President Jacquin.

Noes 9: Alexander, Baldwin, Felix, Gutierrez, Holsclaw, Kret, O'Connor, Roeder, Stump.

Not voting 1: Pena.

Senate Bill 1245 was signed in open session with the emergency and transmitted to the Governor.

RECESS

At 5:31 a.m., the Senate stood at recess subject to the sound of the gavel.

The President called the Senate to order at 9:10 a.m.

MESSAGES FROM THE HOUSE

Messages from Chief Clerk K. E. Betty West advised that on May 10, 1974:

The House acceded to the request of the Senate in the matter of disagreement on Senate Bill 1283, natural resources coordinator, and appointed Members T. Goodwin, Kelley and Dewberry as a free conference committee.

The House concurred in Senate amendments to the following bills and passed on final reading as amended by the Senate:

impair or invalidate the remaining provisions thereof, but shall be confined in its operation to the specific provision or provisions so held unconstitutional or invalid, and the inapplicability or invalidity of any section, clause, sentence or part of this act in any one or more instances shall not be taken to affect or prejudice its applicability or validity in any other instance.

Sec. 14. Supplemental nature of act; construction and purpose

The powers conferred by this act shall be in addition to and supplemental to the powers conferred by any other law, general or special, and bonds may be issued under this act notwithstanding the provisions of any other such law and without regard to the procedure required by any other such laws. Insofar as the provisions of this act are inconsistent with the provisions of any other law, general or special, the provisions of this act shall be controlling.

Sec. 15. Title 15, chapter 7, article 2, Arizona Revised Statutes, is amended by adding section 16-730, to read:

15-730. Abortion at educational facility prohibited: exception

No abortion shall be performed at any facility under the jurisdiction of the board of regents unless such abortion is necessary to save the life of the woman having the abortion

Sec. 16. Emergency

To preserve the public peace, health and safety it is necessary that this act become immediately operative. It is therefore declared to be an emergency measure, to take effect as provided by law.

H.C.M. 2002—STATE OF ARIZONA, 31ST LEGISLATURE, 2ND REGULAR SESSION—HOUSE

Introduced by Representatives Skelly of District 25; Brown of District 3; Cuerrero of District 4; Bradford of District 5; Alley of District 6; Pacheco of District 7; Fenn, Sawyer of District 8; Dewberry, Richey of District 9; Cajero of District 10; Carrillo of District 11; Carlson, Kincaid of District 13; H. Everett, Ratliff of District 15; Lindeman of District 17; West of District 19; Adams, McCune of District 20; Hamilton, Pena of District 22; Abril, Thompson of District 23; Corpstein of District 24; Carvalho, Hungerford of District 28; Cooper, Taylor of District 29; Junasek of District 30; co-sponsored by Senators Tenney of District 1; Gabaldon of District 2; Hubbard of District 3; Hardt of District 4; Swink of District 7; Ulm of District 9; Lena of District 10; Felix of District 11; Strother of District 16; Koory of District 17; Stinson of District 20; Pena of District 22; Camping of District 25; Ellsworth of District 29; Turley of District 30

A concurrent Memorial urging an amendment to the Constitution of the United States establishing that human life with legal personality begins at the time of conception and that all constitutional rights, including due process of law, apply to the unborn in the same manner and to the same extent as to all other citizens of the United States.

To the Congress of the United States of America:

Your memorialist respectfully represents:

Whereas, respect for human life has been a hallmark of civilized society for millennia; and

Whereas, a legal threat to the right to life of any individual member of a society imperils the right to life of every other member of that society; and

Whereas, respect for and protection of unborn human life has been traditional with the medical profession since long before the beginning of the Christian era regardless of prevailing political, religious or social ideologies; and

Whereas, the moment of birth represents merely an identifiable point along the course of human development and not the beginning of human life; and

Whereas, the United States Supreme Court has withdrawn all legal protection from an entire class of human beings, namely, the unborn.

Wherefore your memorialist, the House of Representatives of the State of Arizona, the

Senate concurring, prays:

1. That the Congress of the United States take appropriate action to amend the Constitution of the United States establishing that with respect to the right to life, the word "person" in the fifth and fourteenth amendments to our federal constitution applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function or condition of dependency, except in an emergency where a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother.

[From Phoenix Gazette, Apr 23, 1974]

MEMORIAL ADVANCED BY PANEL

The Senate Judiciary Committee reported out a House-approved Right to Life Memorial after hearing comments from both sides.

The final vote was 4 to 2 with Republican Sens. Sandra O'Connor of Paradise Valley and John Roeder of Scottsdale voting against the memorial. Roeder told the committee his response by Phone calls and written message ran 175 to 72 against the memorial.

Sen. Hal Runyan, R-Litchfield Park, added an amendment which would permit abortions where rape, incest or other criminal action was responsible for a pregnancy.

The memorial calls on Congress to extend constitutional propositions to unborn babies by prohibiting abortions. An exception also would be made where the mother's life was imperiled.

[From the Phoenix Gazette, May 7, 1974]

EXCERPTS FROM A LENGTHY ARTICLE

Mrs. Meyer's interview occurred at a time during which Arizona House Memorial 2002, which urges the U.S. Congress to pass an amendment to the U.S. Constitution