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## LIVE BIRTH: A CONDITION PRECEDENT TO RECOGNITION OF RIGHTS

"[T]he unborn have never been recognized in the law as persons in the whole sense."<sup>1</sup>

The question of when legal rights inhere in the unborn has never been clearly resolved. Current debate on this issue is of particular relevance to the emerging governmental interest in regulating fetal experimentation<sup>2</sup> and the controversy regarding a proposed right-to-life amendment to the United States Constitution.<sup>3</sup>

Courts began declaring restrictive abortion laws unconstitutional in the late 1960's.<sup>4</sup> The trend culminated with the Supreme Court's ruling in *Roe v. Wade*<sup>5</sup> which recognized the unlimited right of a pregnant woman to choose to terminate her pregnancy at least until the last trimester.<sup>6</sup> Critics have argued that these decisions deny the legal rights of the unborn and, therefore, are inconsistent with prior law which has historically recognized the rights of the unborn as equivalent to the rights of those who are live born.<sup>7</sup>

The thrust of this article is not to determine whether a fetus is a person<sup>8</sup> but rather to evaluate what legal rights, if any, have been accorded a fetus. As a basis for this evaluation, property law, criminal law, relevant support laws, tort law, court-ordered treatment of pregnant women, and fetal experimentation will be reviewed. As set forth in the article, this review reveals that, contrary to the claims of critics of liberalized abortion laws and

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1. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

2. See notes 157-75 *infra* and accompanying text.

3. S.J. Res. 140, S.J. Res. 141, 94th Cong., 1st Sess. (1975).

4. *E.g.*, *Babbitt v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970) (three-judge court), *appeal dismissed*, 400 U.S. 1 (1970); *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970).

5. 410 U.S. 113 (1973).

6. *Id.* at 163.

7. See, *e.g.*, Byrnn, *Wade and Bolton: Fundamental Legal Errors and Dangerous Implications*, 19 CATH. LAW. 243 (1973); Comment, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250 (1975); Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 369 (1971); 121 CONG. REC. S.18193 (daily ed. Oct. 20, 1975).

8. No contention is made by the use of the words "live," "living," or "person" that the fetus is not alive. The scope of this article is restricted to the legal rights of the unborn vis-a-vis the born.

proponents of a right-to-life amendment, the law has never recognized the rights of the born and unborn as equivalent.

### *Property Law*

When the Supreme Court discussed the "unborn" in *Roe v. Wade* it noted the interest of the state in protecting only the "potentiality of human life."<sup>9</sup> It thus distinguished between the unborn and the born, and the different rights that attach at the separate stages of being.<sup>10</sup> Property law consistently makes the same distinction. Although the law of property acknowledges that "an infant *en ventre sa mere* . . . is supposed . . . to be born for many purposes,"<sup>11</sup> the courts repeatedly distinguish between the vesting of an interest *in utero* and the vesting in possession upon live birth. If there is no live birth, the vesting in interest has no effect.

According to Blackstone, an infant *en ventre sa mere* is considered born because, *inter alia*, "[i]t is capable of having a legacy . . . and it is enabled to have an estate limited to its use, and to take afterwards by such limitation . . . ."<sup>12</sup> American case law adopted the language of the English common law with regard to property rights of the unborn.<sup>13</sup> A close reading of the American cases and their construction of the language adopted from the English reveals, however, that American courts require live birth as a condition precedent to the perfecting of interests which vest *in utero*, and have recognized that the concept that a child *en ventre sa mere* is alive is a fiction.<sup>14</sup>

In *In re Peabody*,<sup>15</sup> for example, the New York Court of Appeals directly confronted the issue of whether a child *en ventre sa mere* is a "person" beneficially interested in a trust. If the unborn were considered a "person" for purposes of section 23 of the New York Personal Property Law<sup>16</sup> then an amendment to the trust at issue could not be effectuated absent its consent. The court held that the consent "only of those persons who are *alive*,

9. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

10. *Id.* at 164-65.

11. 1 W. BLACKSTONE, COMMENTARIES \*130.

12. *Id.*

13. See, e.g., *Cowles v. Cowles*, 56 Conn. 240, 13 A. 414 (1887); *Medlock v. Brown*, 163 Ga. 520, 136 S.E. 551 (1927); *McClain v. Howald*, 120 Mich. 274, 79 N.W. 182 (1889).

14. E.g., *In re Peabody*, 5 N.Y.2d 541, 158 N.E.2d 841, 186 N.Y.S.2d 265 (1959); *Kimbro v. Harper*, 113 Okla. 46, 238 P. 840 (1925).

15. 5 N.Y.2d 541, 158 N.E.2d 841, 186 N.Y.S.2d 265 (1959).

16. N.Y. PERS. PROP. LAW § 23 (McKinney 1962).

who are actually born and living, at the time of the proposed revocation"<sup>17</sup> is required and, therefore, declared the amended trust to be valid without the consent of the unborn. Although the *Peabody* court was construing only one particular statute, the same rule of construction used in *Peabody* has been applied in construing devises by deed or will.<sup>18</sup>

Of greater import than the ultimate holding in *Peabody* is the court's denial of the appellants' contention that if a child *en ventre sa mere* is alive for purposes of taking property, it should be regarded as a person for purposes of the statute and the amendment to the trust under consideration by the court. The court responded:<sup>19</sup>

[Such] argument overlooks the considerations . . . which led to the recognition of that concept. Because of the necessity in medieval England always to have available a living person who could be charged with the performance of feudal duties, the common law developed the rule that a remainder estate was destroyed if the heir or devisee was not alive when the prior estate came to an end. Conception before such termination, followed by subsequent birth, was not enough; the lord of the manor needed a living person from whom or from whose guardian he could require allegiance and service. [Citations omitted.] In consequence, therefore, a posthumous child could not take from or through his deceased father.

With the wane of the feudal system however, the performance of feudal duties became less important and the courts sought a device by which they could mitigate the rigors of the rule. They found such a device in the fiction . . . that, for the purpose of taking an estate or gift, a child *en ventre sa mere* would be considered born and living at the termination of the prior estate . . . provided that the child was later born and able to take possession of the gift or inheritance.

For the *Peabody* court, birth, rather than the date of conception, was the controlling factor in ascertaining the existence of a "person" beneficially interested in a trust. Similar language appears in *In re Lee's Will*<sup>20</sup> where the court held that a citation

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17. 5 N.Y.2d 541, 544, 158 N.E.2d 841, 842-43, 186 N.Y.S.2d 265, 267 (1959) (emphasis added).

18. *Medlock v. Brown*, 163 Ga. 520, 136 S.E. 551 (1927).

19. *In re Peabody*, 5 N.Y.2d 541, 546, 158 N.E.2d 841, 844, 186 N.Y.S.2d 265, 269 (1959) (emphasis in original).

20. 203 Misc. 165, 116 N.Y.S.2d 282 (Sur. Ct. Suffolk County 1952).

could not be served upon an unborn *en ventre sa mere* because<sup>21</sup>

the existence of the infant as a real person before birth is a fiction of law, for the purpose of providing for and protecting the child, in the hope and expectation *that it will be born alive and be capable of enjoying those rights which are thus preserved for it in anticipation.*

Absent live birth, an interest vests for the purposes of property law in theory only and has no practical effect. Professor Simes, for example, maintains that, "[i]t is not strictly accurate to say that a limitation in favor of an unborn creates a future interest."<sup>22</sup> He then explains that:<sup>23</sup>

The accepted analysis of the character of an interest in property is to the effect that it consists of a group of legal relations. But legal relations can exist only between persons. [Citations omitted.] Hence, we cannot say that the unborn person has an interest.

In addition, under both statutory<sup>24</sup> and case law,<sup>25</sup> only a subsequent *live* birth of a child will operate to prevent a testator's "death without issue."<sup>26</sup> For example, if an instrument reads, "to A and his heirs, but if A die without issue then to B" and A dies leaving a child in gestation, the gift to B will fail, only if there is a live birth of a posthumous child.<sup>27</sup>

In 1922 the Illinois Supreme Court,<sup>28</sup> in determining the construction of a will, articulated the basic presumption that:<sup>29</sup>

A child *en ventre sa mere* is capable of taking a legacy or devise. The only requisite for such child taking in the same manner as other children is that it shall be afterwards born. If it be born dead, or in such early stage of gestation as to be incapable of living, it is as if it had never been born or conceived.

21. *Id.* at 166, 116 N.Y.S.2d at 283 (emphasis added).

22. L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 2 (2d ed. 1966).

23. *Id.* at 2 n.4.

24. *E.g.*, NEB. REV. STAT. § 76-111 (1971); N.Y. EST., POWERS & TRUSTS LAW § 6-5.7(b) (McKinney 1967).

25. *E.g.*, Barnett v. Pinkston, 238 Ala. 327, 191 So. 371 (1939); Kimbro v. Harper, 113 Okla. 46, 238 P. 840 (1925); Tomlin v. Laws, 301 Ill. 616, 134 N.E. 24 (1922).

26. L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS § 545, at 540 (2d ed. 1956).

27. *See id.* *See also* N.Y. EST., POWERS & TRUSTS LAW § 6-5.7(b) (McKinney 1967). The statute reads: "A future estate conditioned upon the death of a person without children . . . or issue is defeated by the birth of a child conceived before but born alive after the death of such person."

28. Tomlin v. Laws, 301 Ill. 616, 134 N.E. 24 (1922).

29. *Id.* at 618, 134 N.E. at 25.

Similarly, the court in a 1925 Oklahoma case<sup>30</sup> held that a posthumous child is considered "living" at the death of its father and, if born alive, all of its rights as an heir inure to its benefit.

In *Barnett v. Pinkston*,<sup>31</sup> the Supreme Court of Alabama had to determine whether a child born two months after the death of its father was a "living" child at the time of its father's death. The court held that the child *en ventre sa mere* was "living" and did take a vested remainder in property that had been left to its father "with remainder to his children living at the time of his death." The child was, however, liveborn and even though it lived only for a few hours, it defeated the claims of those who asserted a right to the property on the grounds that the testator had died without issue. In *Utah Copper Co. v. Industrial Commission*,<sup>32</sup> when considering whether it had the authority to appoint a guardian ad litem to represent the unborn, the court stated, "The statutory provisions, making a posthumous child an heir . . . of necessity, carry with them the inference that such child, upon birth, comes into or acquires certain property rights."<sup>33</sup>

In *re Well's Will*<sup>34</sup> allowed a child born after the death of the testatrix to partake in the fund provided for in the will, but clearly indicated that such participation is allowed only where the description in the bequest is to a "child living" and that child, *en ventre sa mere* at the time of the testatrix's death is "subsequently born alive and capable of living . . . ."<sup>35</sup> The court explained that a child *in utero*, "should be deemed living, because the potential existence of such child places it within the reason and motive of the gift."<sup>36</sup> The potential, of course, can be realized only upon live birth.

*Industrial Trust Co. v. Wilson*<sup>37</sup> held that a posthumous child should share equally with its siblings from the date of the death of the testator in the income of a trust which the trustee was directed to pay "to the surviving child or children of such deceased son or brother." It has been asserted that *Industrial Trust*

30. *Kimbro v. Harper*, 113 Okla. 46, 238 P. 840 (1925).

31. 238 Ala. 327, 191 So. 371 (1939).

32. 57 Utah 118, 193 P. 24 (1920).

33. 193 P. at 33 (dicta).

34. 129 Misc. 447, 221 N.Y.S. 714 (Sur. Ct. Westchester County 1927).

35. *Id.* at 451, 221 N.Y.S. at 719.

36. *Id.* at 452, 221 N.Y.S. at 720, quoting *Hall v. Hancock*, 32 Mass. (15 Pick.) 255, 26 Am. Dec. 598 (1845).

37. 61 R.I. 169, 200 A. 467 (1938).

Co. supports the principle that the rights of the unborn are the same as the rights of the born<sup>38</sup> inasmuch as the accrual of the income was held to begin from the date of death of the testator rather than from the date of the subsequent live birth. Such an assertion, however, fails to take into account the fact that, but for the subsequent live birth of the child, the prenatal accrual of income would be meaningless. If live birth had failed to occur, the computation of benefits would be made as if the unborn had never existed.

In determining if and when the unborn are entitled to inherit property, the courts often express the view that the unborn will be considered alive while *en ventre sa mere* if it is to its benefit to be so considered.<sup>39</sup> Whether property rights of the unborn will be recognized if they are not to its benefit remains, however, an open question.

In discussing this issue, the New York court in *In re Well's Will*<sup>40</sup> noted that it is rare that it is not for the unborn's benefit to be considered born.<sup>41</sup> According to the court, when the rare case has arisen "[w]hen it is detrimental to the child to regard him as born, two American jurisdictions [Virginia and Pennsylvania] have not included him."<sup>42</sup> Unlike situations in which the property rights of the unborn are at issue, the status of the property rights of persons already born does not turn on whether the court determines, on a case-by-case basis, that the right will inure to the person's benefit or detriment. The property rights of the born and the unborn, therefore, are not equivalent.

Further support for the thesis that the unborn are not recognized as legal entities in the same sense as persons in being is found in the cases which hold that there cannot be an administrator of the estate of a stillborn. In *In re Roberts' Estate*<sup>43</sup> the court

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38. Note, *The Unborn Child and the Constitutional Conception of Life*, 56 IOWA L. REV. 994, 1000 (1971).

39. *McClain v. Howald*, 120 Mich. 274, 279, 79 N.E. 182, 183 (1899); *In re Well's Will*, 129 Misc. 447, 451, 221 N.Y.S. 714, 719 (Sur. Ct. Westchester County 1927); *Industrial Trust Co. v. Wilson*, 61 R.I. 169, 200 A. 467 (1938); *Utah Copper v. Industrial Comm'n*, 57 Utah 118, 193 P. 24, 33-34 (1920).

40. 129 Misc. 447, 221 N.Y.S. 714 (Sur. Ct. Westchester County 1927).

41. *Id.* at 452, 221 N.Y.S. at 720.

42. *Id.* See also Note, 16 HARV. L. REV. 601-02 (1903). The note indicates that although it is generally assumed that within the Rule Against Perpetuities a child *en ventre sa mere* is always considered born, as of the date of the note, it had never been so held where detriment to the infant might result.

43. 158 Misc. 698, 286 N.Y.S. 476 (Sur. Ct. N.Y. County 1936).

denied limited letters of administration to the father of an unborn child whose mother was killed in an accident on the grounds: "(1) that the person alleged to be a deceased person never had a legal existence, and (2) that the property right alleged as a basis for the petition . . . never came into existence."<sup>44</sup>

In many states there are statutes which authorize the courts to appoint guardians ad litem for the purpose of representing unborn persons in proceedings before the court which might affect the future interest of the unborn.<sup>45</sup> Although it might be argued that statutes of this kind are proof that the state recognizes that the unborn have rights, the fact is that the perfection of any interest protected by the guardian will depend on the subsequent live birth of the child. For example, in *Utah Copper v. Industrial Commission*<sup>46</sup> the court held that it had authority to appoint a guardian ad litem to represent the interests of the unborn to determine whether there should be an election to obtain worker's compensation benefits and waive a cause of action in negligence against the employer of the deceased parent. The court referred specifically to the requirement of live birth when it wrote, "Can it be contended by anyone that a court is without authority . . . to in some way protect that child's inheritance . . . for the delivery of the property to the child or its guardian upon its birth?"<sup>47</sup> The court further held that the Industrial Commission had the authority to withhold the payment of any part of the award until the birth of the unborn child and thereby recognized, once again, the requirement of live birth.

Contrary, then, to the claims of the critics of liberalized abortion statutes and cases which declared restrictive abortion laws unconstitutional,<sup>48</sup> *Roe v. Wade*<sup>49</sup> and its predecessors were not

44. *Id.* at 700, 286 N.Y.S. at 478; *accord, In re Scanelli*, 208 Misc. 804, 142 N.Y.S.2d 411 (Sur. Ct. Nassau County 1955).

45. *E.g.*, IOWA CODE ANN. R.C.P. 298 (1951); KAN. STAT. ANN. § 59-2254 (Cum. Supp. 1975); MASS. GEN. LAWS ANN. ch. 183, § 50, ch. 185, § 40, ch. 201, § 34 (1958); MINN. STAT. ANN. § 508.18 (1947); N.Y. REAL PROP. ACTIONS § 1608 (McKinney 1963); N.C. GEN. STAT. § 1A-1, Rule 17 (Cum. Supp. 1975); PA. STAT. ANN. tit. 20, § 751 (5) (1975); VA. CODE ANN. § 8-88 (1950); WASH. REV. CODE ANN. § 65.12.145 (1966). For a discussion of the types of cases in which guardians ad litem are appointed to represent the interests of the unborn see *Deal v. Wachovia Bank & Trust Co.*, 218 N.C. 483, 11 S.E.2d 464 (1940); *Deal v. Sexton*, 144 N.C. 157, 56 S.E. 691 (1907); *Peoples Nat'l Bank v. Barlow*, 235 S.C. 488, 112 S.E.2d 396 (1960).

46. 57 Utah 118, 193 P. 24 (1920).

47. 193 P. at 33.

48. See, *e.g.*, Comment, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250 (1975); Comment, *The Unborn Child and the*



aberrations. Rather, they were consistent with legal theory as developed through the years concerning the rights of the unborn with respect to inheritances and the transfer of property.

### *Criminal Law*

The requirement of live birth in facets of the criminal law is as essential as it is in the law of property in determining at what point rights inhere in a person. The killing of an unborn, for instance, cannot be the basis of a manslaughter or homicide indictment if a live birth did not occur. This rule originated at English common law and has been adopted almost unanimously by the American courts.<sup>50</sup> The rationale of this common law requirement is that one cannot be held criminally liable for the death of something which has never been alive or is already dead.<sup>51</sup> The burden is therefore on the prosecution to establish

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*Constitutional Conception of Life*, 56 IOWA L. REV. 994 (1971); Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349, 369-72 (1971).

49. 410 U.S. 113 (1973).

50. Meldman, *Legal Concepts of Human Life: The Infanticide Doctrines*, 52 MARQ. L. REV. 105, 106-12 (1968); Comment, 22 SYRACUSE L. REV. 828, 829 n.10 (1971).

The English common law cases do not fully agree on what criteria are necessary to establish live birth (*i.e.*, respiration during or after birth, or severance of the umbilical cord) but concur in the requirement that the whole body of the child must be in the world before a charge of homicide can be sustained. See Brief for Appellant at 92-95, *Commonwealth v. Edelin*, Crim. No. 81823, on appeal, No. 81823 (Ct. App. Suffolk County, Mass., filed July 1, 1975).

American cases are divided over what criteria are sufficient to establish live birth, but they all require definite proof that the child has been born alive before a conviction of homicide will be sustained. *E.g.*, *Keeler v. Superior Court of Amador County*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970); *Montgomery v. State*, 202 Ga. 678, 44 S.E.2d 242 (1947); *State v. Gyles*, 313 So. 2d 799 (La. 1975); *People v. Hayner*, 300 N.Y. 171, 90 N.E.2d 23 (1949); *State v. Dickinson*, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971); *State v. Collington*, 259 S.C. 446, 192 S.E.2d 856 (1972); *Morgan v. State*, 148 Tenn. 417, 256 S.W. 433 (1923); *Bennett v. State*, 377 P.2d 634, 635-37 (Wyo. 1963).

See also MODEL PENAL CODE § 210.0 (Proposed Official Draft 1962) which, "unless a different meaning plainly is required," defines a human being as "a person who has been born and is alive."

51. *Singleton v. State*, 33 Ala. 536, 35 So. 2d 375, 378 (1948); *Montgomery v. State*, 202 Ga. 678, 44 S.E.2d 242, 244 (1947).

The rationale of the common law rule that one cannot be the victim of a homicide absent live birth was questioned in *People v. Chavez*, 77 Cal. App. 2d 621, 176 P.2d 92 (Dist. Ct. App. 4th Dist. 1947), because the court could not see "much change in the child itself between a moment before and a moment after its expulsion from the body of its mother . . ." 176 P.2d at 94. The *Chavez* court stated that "where [a fetus] is a living baby and where in the natural course of events a birth which is already started would naturally be successfully completed" a fetus should be considered a human being. *Id.* The court posed, but did not answer, the problem of modifying the common law rule inasmuch

live birth beyond a reasonable doubt.<sup>52</sup> The difficulty in meeting this burden is demonstrated in *People v. Hayner*<sup>53</sup> where the court even rejected expert medical testimony that the child was born alive and had a living existence separate and independent from its mother on the grounds that because neither "an eye [n]or an ear witness [to the birth] came forth" the medical testimony was "of slight or merely conjectural significance."<sup>54</sup>

In *State v. Gyles*,<sup>55</sup> decided in 1975, the Louisiana Supreme Court stated:<sup>56</sup>

[T]he common law crime of murder which proscribes the killing of a 'human being' contemplates only the killing of those human beings who have been born alive and who thus have an existence independent of their mothers at the time of their death.

Similarly, in July 1975, defendant Winfield Anderson was convicted in New Jersey Supreme Court of the murder of seven and one-half month twin fetuses who were victims of a wound upon their mother, were born alive, and died hours later. In his instructions to the jury the judge relied on the common law rule that a fetus may be a murder victim only if born alive.<sup>57</sup>

This common law rule was applied in the case of Dr. Kenneth Edelin who was convicted of the crime of manslaughter of the

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as there was sufficient evidence in *Chavez* to support a finding of a live birth.

Although some jurisdictions do use the test formulated in *Chavez* (e.g., *Singleton v. State*, 33 Ala. 536, 35 So. 2d 375 (1948); *State v. Shephard*, 255 Iowa 1218, 124 N.W.2d 712 (1964)) the impact of the language in *Chavez* is limited. As the court stated in *Keeler v. Superior Court of Amador County*:

*Chavez* thus stands for the proposition . . . that a viable fetus "in the process of being born" is a human being within the meaning of the homicide statutes. But it stands for no more; in particular it does not hold that a fetus, however viable, which is *not* 'in the process of being born' is nevertheless a 'human being' in the law of homicide.

2 Cal. 3d 619, 629, 470 P.2d 617, 629, 87 Cal. Rptr. 481, 493 (1970) (emphasis in original). Thus, even if the law were modified in accordance with the *Chavez* suggestion, the existence of an independent and separate being must be established before there can be a victim of a homicide, and the unborn *in utero* do not meet such a test.

52. See Annot., 65 A.L.R.3d 413 (1975); Annot., 40 A.L.R.3d 444 (1971).

53. 300 N.Y. 171, 90 N.E.2d 23 (1949).

54. *Id.* at 176, 90 N.E.2d at 25.

55. 313 So. 2d 799 (La. 1975).

56. *Id.* at 800-01.

57. Case reported in N.Y. Times, July 16, 1975, at 78, col. 8. The issue of whether fetuses are persons protected by New Jersey homicide statutes had never been resolved before and may be resolved on appeal. The case is currently on appeal to the New Jersey Superior Court, Appellate Division (No. A. 126-75, filed Sept. 12, 1975).

fetus he aborted (with the consent of the mother) in 1975.<sup>58</sup> The aborted fetus was estimated at between 20 and 24 weeks in gestation. The basis of the jury's determination was, in fact, the common law rule that live birth is required. Despite the prosecution's arguments that the law of manslaughter should apply from the point at which the birth process commences, the trial judge instructed the jury that in order to convict Dr. Edelin it had to believe that the fetus died *after* it had been completely removed from the mother's body and that manslaughter must have occurred after the fetus became a "person" by its removal from the mother's body.<sup>59</sup>

The instructions to the jury in *Edelin* were fully in accord with both the common law and with *Roe v. Wade*<sup>60</sup> (which is itself consistent with past legal theory). The *Edelin* jury instructions were based on the common law recognition that the state cannot criminally prosecute conduct which causes the death of an unborn because until one is a person with an established life, no right to such protection exists.<sup>61</sup> Similarly, under the *Roe* standard, the "compelling" point with respect to the state's legitimate interest in potential life is the point of viability<sup>62</sup>—the time at which a fetus, if delivered into the world, could successfully live outside its mother's womb and thereby establish itself as a separate person in whom rights can inhere. Not until that point (the functional equivalent of live birth) are rights of the unborn even possibly recognizable.

The Supreme Court, in *Roe v. Wade*,<sup>63</sup> did not refer to a fetus as a person and did not mandate protection of fetal life. The

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58. Conviction obtained on February 15, 1975 in Massachusetts Superior Court. Brief for Appellant at 1, *Commonwealth v. Edelin*, Crim. No. 81823, *on appeal*, No. 81823 (Ct. App. Suffolk County, Mass., filed July 1, 1975).

59. *Id.* at 39-43.

60. 410 U.S. 113 (1973).

61. The *Edelin* case is currently on appeal on the grounds that "there was no competent proof that the fetus was ever born alive outside the mother" inasmuch as the testimony was to the effect that, upon removal, the fetus was dead, *id.* at 39, there was no proof of wanton or reckless conduct toward the fetus by the defendant after its purported birth, and the defendant "was never accused of the offense of which he was convicted." *Id.* at 41. Specifically, the bill of particulars alleged that "the subject died before complete removal from the mother's body and [that] the . . . act of manslaughter . . . [occurred] before complete removal of the fetus from the mother." *Id.* However, the judge instructed the jurors that they could not convict unless they believed that "the fetus died after complete removal from the mother's body and [that] the act of manslaughter occurred after the fetus had become a "person" by its removal alive from its mother's body. *Id.*

62. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

63. 410 U.S. 113 (1973).

Court in *Roe* left the decision of whether potential life (*i.e.*, fetal life) ought to be protected to the state legislatures and allowed states to proscribe abortion *if* they choose to do so but only *after* the point of viability. It would then follow that only where the act took place after this point and the fetus was separate and independent of its mother's body could a prosecution for manslaughter be brought.

*Roe* held that even at the "compelling" point of viability abortion may not be proscribed if it is necessary to preserve the life or health of the mother.<sup>64</sup> The unborn, then, according to *Roe* have no rights or, at most, they may have a recognizable right to potential life which is subordinate to the rights of the mother, the living person involved.

In contrast to the common law and *Roe v. Wade*<sup>65</sup> which consistently recognize that absent live birth or its equivalent, the unborn have no right to protection by the state, statutory efforts<sup>66</sup> have been made to afford certain protections to the unborn and to criminalize the destruction of beings *in utero*. Although feticide statutes arguably represent recognition by the states that the unborn have certain rights deserving protection, it is not always true that the sole intent of these statutes is to recognize the rights of the unborn as equivalent to those of persons already born.

On its face, for instance, section 125.00 of the New York Penal Law<sup>67</sup> arguably contemplates that two lives and not one are destroyed if the fetus is more than 24 weeks in gestation. However, while New York Penal Law section 125.00<sup>68</sup> criminalizes "conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks," New York Penal Law section 125.05 (1)<sup>69</sup> defines "person" for the purpose of homicide as "a human being who has been born and is alive." If fetuses are human beings equivalent to those already live born there would be no reason for this contradiction in the law. Perhaps the resolution to this seeming contradiction lies in the recognition that the intent of section 125.00 was to

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64. *Id.* at 165.

65. 410 U.S. 113 (1973).

66. *E.g.*, CAL. PENAL CODE § 187 (West Cum. Supp. 1975); FLA. STAT. ANN. § 782.09 (Cum. Supp. 1975); MISS. CODE ANN. § 97-3-37 (1972); N.Y. PENAL LAW § 125.00 (McKinney 1975).

67. N.Y. PENAL LAW § 125.00 (McKinney 1975).

68. *Id.*

69. *Id.* § 125.05 (1) (McKinney 1975).

protect the mother, not the fetus.<sup>70</sup>

The Practice Commentaries to the New York Penal Law indicate that greater liability for unlawful abortion resulting in the death of the aborted female who is more than 24 weeks pregnant at the time of the crime "is based upon the premise that an abortion performed so late in pregnancy is considerably more dangerous, and hence considerably more culpable, than one performed at an early stage."<sup>71</sup> Cyril Means' article exploring New York's abortion law<sup>72</sup> notes persuasively that inasmuch as it is not more dangerous to the fetus if an abortion or murder is committed after, rather than before, the twenty-fourth week of pregnancy, it is the greater danger to the woman and not to the fetus that resulted in criminalizing abortion after the twenty-fourth week of pregnancy. This observation is consistent with research that has shown that statutes limiting the right to abortion were intended to protect the life of the mother and not the life of the fetus.<sup>73</sup>

In *Byrn v. New York City Health and Hospital Corp.*<sup>74</sup> the court was petitioned by the guardian ad litem of unborn children to declare New York's "liberalized" abortion law<sup>75</sup> unconstitutional on the grounds that by permitting abortions until the twenty-fourth week of pregnancy, the law denied the unborn the right to life. The underlying issue in the suit was whether children

70. See Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968); Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth Amendment Right About to Arise from the 19th Century Ashes of a 14th Century Common Law Liberty?*, 17 N.Y.L.F. 335 (1971); Appendix I to REPORT OF U.S. COMMISSION ON CIVIL RIGHTS, CONSTITUTIONAL ASPECTS OF THE RIGHT TO LIMIT CHILDBEARING, Apr. 1975, at 103-04.

71. N.Y. PENAL LAW § 125.20(3) (McKinney 1975).

72. Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968). Means also contends that New York statutes, particularly Criminal Procedure Law section 69-c-d-e (McKinney Supp. 1968), in force since 1664, which permits the execution of a pregnant woman under sentence of death and authorized her reprieve only if the fetus had quickened, prove that the New York Legislatures of 1828, 1881, 1910, and 1967 have not concurred with philosophical speculation that a fetus has a right to be born. He explains that although New York law

does not authorize the slaughter of an innocent child after birth because of its mother's crime . . . it executes both her and her fetus before the latter's quickening without hesitation, not because the unquickened fetus is not innocent, but because, not being a human person it is incapable of guilt or innocence.

*Id.* at 442-43.

73. See note 70 *supra*.

74. 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), *appeal dismissed for want of substantial federal question*, 410 U.S. 949 (1973).

75. N.Y. PENAL LAW § 125.00 (McKinney 1975).

*in utero* are to be recognized as legal persons who are entitled to the right to life. The court upheld the statute and determined that neither the state nor federal constitution considers the rights of the born and unborn as equivalent. It deferred to the legislature to decide, as a matter of policy, what protections, if any, should be afforded the unborn. The court cautioned that although in religion and philosophy, "a conceived child may be a person [even] at a fetal stage," the legal order does not necessarily correspond to the natural order.<sup>76</sup> As the court pointed out, the fact that the law recognizes corporations as "persons" does not "make these 'natural' nonentities facts in the natural order."<sup>77</sup>

Mississippi<sup>78</sup> and Florida<sup>79</sup> have almost identical feticide statutes which appear to have been motivated by legislative concern for the unborn. The deciding factor, however, in how the state views the severity of the crime "wilful killing of an unborn child by injury inflicted upon the mother" is the nature and the extent of the injury to the mother. The fetus dies whether the defendant's conduct comes within that proscribed by the feticide or murder sections of the penal code. The unborn come within the ambit of state protection only because of their intimate relationship with the mother who is the actual focus of the states' concern in these statutes.<sup>80</sup>

The California Penal Code was first amended in 1970 to include the crime of feticide.<sup>81</sup> The amendment was apparently the

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76. 31 N.Y.2d 194, 201, 286 N.E.2d 887, 889, 335 N.Y.S.2d 390, 393 (1972).

77. *Id.*

78. MISS. CODE ANN. § 97-3-37 (1972):

The wilful killing of an unborn quick child, by an injury to the mother of such child, which would be murder if it resulted in the death of the mother, shall be manslaughter.

79. FLA. STAT. ANN. § 782.09 (Cum. Supp. 1975):

The wilful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter . . . .

80. See *Williams v. State*, 34 Fla. 217, 15 So. 760 (1894); *Passley v. State*, 194 Ga. 327, 21 S.E.2d 230 (1942). *Passley* in discussing the Georgia feticide statute (almost identical in language to the Mississippi and Florida feticide statutes but repealed in 1973) notes that "it is obvious that the General Assembly did not consider the unborn child such a human being that its unlawful killing with malice aforethought would constitute murder . . . ." 194 Ga. 327, 21 S.E.2d 230, 232 (1942).

81. CAL. PENAL CODE § 187 (West Cum. Supp. 1975):

§ 187. Murder defined; death of fetus

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

*Underline* indicates addition by amendment.

result of a legislative determination to criminalize the conduct that went unpunished in *Keeler v. Superior Court of Amador County*.<sup>82</sup> In *Keeler*, the court dismissed the charge of murder against a defendant who had beaten his estranged wife who was several months pregnant. As a result of the beating the fetus was stillborn.<sup>83</sup> The court dismissed the charge on the ground that when the 1850 legislature had defined "murder" it had intended to exclude from its reach the act of killing an unborn fetus.<sup>84</sup> The court indicated that any change in the construction of the law would have to await legislative action. The amended California statute, however, like the New York, Florida, and Mississippi statutes discussed above,<sup>85</sup> distinguishes fetuses from persons, thus implying that unborn fetuses<sup>86</sup> are not legally identical with beings who have already been born alive.

Although the Model Penal Code criminalizes abortion, it exempts a mother from criminal liability for self-abortion except late in pregnancy.<sup>87</sup> The Code's comments state that "it is unlikely that more than half the American jurisdictions would permit a conviction [of a mother] under present laws, and prosecution of the mother is so rare that no reported decisions have been found."<sup>88</sup> Why, if the state actually recognizes the rights of the

82. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

83. Medical testimony estimated that the fetus had a 75 percent chance of survival had there been a live birth at that point in its development.

84. *Keeler v. Superior Court of Amador County*, 470 P.2d 617, 624, 87 Cal. Rptr. 481, 488 (1970).

85. See notes 75, 78, & 79 *supra* and accompanying text.

86. The California statute is so poorly drafted that it does not even specify that the fetus being protected need be a human fetus. Under the statute as worded, one could conceivably be held criminally liable for killing the fetus of a nonhuman animal. The statute has not yet been construed nor has its constitutionality been tested by the courts.

87. MODEL PENAL CODE § 230.3(4) (Proposed Official Draft 1962).

A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth . . . .

*Id.*

An attempt to terminate a pregnancy in the later stages probably calls for special repressive measures because of *the greater danger to the mother* and because the respect for human life which underlies the *social effort* to control abortion assumes increasing relevance as the fetus passes into the stage of recognizable, viable humanity.

MODEL PENAL CODE § 207.11, Comment 9 (Tent. Draft No. 9, 1959) (emphasis added).

88. MODEL PENAL CODE § 207.11, Comment 9 at 158 (Tent. Draft No. 9, 1959). See, e.g., *In re Vickers*, 371 Mich. 114, 123 N.W.2d 253 (1963), where the court refused to permit the prosecution of a woman upon whom an abortion had been committed even though the woman had consented to the abortion. The court implied that if a woman were made

unborn as equivalent to the rights of living persons, should a category of crime other than homicide/feticide be necessary? Why would a state prohibit abortion and not criminalize feticide? Perhaps the explanation is that: (1) statutes limiting the right to abortion were intended to protect the life of the mother rather than the fetus,<sup>89</sup> and (2) states do not recognize a fetus as a person deserving protection.<sup>90</sup>

*Roe v. Wade*,<sup>91</sup> which held that state attempts to proscribe all abortions are unconstitutional, sounded the death knell to the claim that the unborn are recognized as the equivalent of persons under the law. Restrictive abortion statutes challenged after *Roe* have generally been declared invalid.<sup>92</sup> Abortion litigation which is currently pending<sup>93</sup> focuses on those questions which were either left unanswered or ambiguously resolved by the Supreme Court. Intercircuit disagreement currently exists, for instance,

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subject to prosecution under the act which prohibited abortions it would be impossible to convict most abortionists in cases where the woman was also prosecuted and chose to exercise her privilege against self-incrimination.

89. See text accompanying note 70 *supra*.

90. Comments made in the MODEL PENAL CODE (Tent. Draft No. 9, 1959) are noteworthy in this regard. The concern of the drafters of the sections on abortion in the MODEL PENAL CODE (§ 207.11 Tent. Draft No. 9, 1959; § 230.3 Proposed Official Draft, 1962) was the danger posed to the health of the mother by abortion procedures, not the protection of the fetus' life. The Comments include the following observation:

On the whole we recommend a policy of cautious expansion of the categories of lawful justification of abortion upon the following principles:

...  
(C) The criminal law in this area cannot undertake or pretend to draw the line where religion or morals would draw it. . . . [M]oral standards in this area are in a state of flux, with wide disagreement among honest and responsible people. . . . To use the criminal law against a substantial body of decent opinion, even if it be minority opinion, is contrary to our basic traditions.

91. 410 U.S. 113 (1973).

92. *E.g.*, *Vuitch v. Hardy*, 473 F.2d 1370 (4th Cir.), *cert. denied*, 414 U.S. 824 (1973); *Hodgson v. Anderson*, 378 F. Supp. 1008 (D. Minn. 1974), *dismissed*, 420 U.S. 903; *Abele v. Markle*, 369 F. Supp. 807 (D. Conn. 1973); *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973), *vacated and remanded*, 410 U.S. 950 (1973); *Doe v. Turner*, 361 F. Supp. 1288 (S.D. Iowa), *appeal denied*, 488 F.2d 1134 (8th Cir. 1973); *Doe v. Israel*, 358 F. Supp. 1193 (D.R.I. 1973), *cert. denied*, 416 U.S. 993 (1974); *Henrie v. Derryberry*, 358 F. Supp. 719 (N.D. Okla. 1973).

93. *Baird v. Bellotti*, 393 F. Supp. 847 (D. Mass.), *prob. juris. noted*, 96 S. Ct. 390 (1975); *Planned Parenthood v. Danforth*, 392 F. Supp. 1362 (E.D. Mo.) (three-judge court), *enforcement of statute stayed*, 420 U.S. 918, *cert. granted*, 96 S. Ct. 31 (1975) (set for oral argument to be heard in tandem with *Baird*); *Poe v. Gerstein*, 517 F.2d 787 (5th Cir.), *appeal filed*, 44 U.S.L.W. 3351 (U.S. Nov. 14, 1975). These cases raise *inter alia* the issue of specific time of viability of the fetus, the requirements of spousal or parental consent for abortions, and the requirement that doctors take the same care of the fetus that is aborted as of a fetus intended to be born alive.



with regard to what the *Roe* Court meant by "viability." The exact language in that case is that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."<sup>94</sup> The issue is clearly framed in *Wolfe v. Schroering*<sup>95</sup> which states:<sup>96</sup>

The question, then, is whether the decision flatly holds that viability occurs no sooner than 24 weeks and thus the state's interest is not compelling until then, . . . [or whether] [b]ecause the point at which viability may be ascertained varies, the state's interest in preserving the fetus also varies as to the time it becomes compelling. [If the latter is the case] the state will have to rely on the doctors and their medical judgment to determine viability.

Both *Wolfe* and *Planned Parenthood v. Danforth*<sup>97</sup> upheld language in abortion statutes which did not state the number of weeks at which viability occurs. *Wolfe* left the determination to the judgment of the woman's physician. Conceivably, under *Wolfe*, viability could be determined to occur prior to 24 weeks. The *Danforth* court, however, in upholding the statute at issue, construed the language as being even more restrictive than that suggested in *Roe* "since [the statute] requires that the life of the fetus be capable of being continued 'indefinitely' outside the womb before it is to be considered viable."<sup>98</sup>

Unlike *Wolfe* and *Danforth*, *Hodgson v. Anderson*,<sup>99</sup> *Leigh v. Olson*,<sup>100</sup> and *Planned Parenthood Association v. Fitzpatrick*<sup>101</sup> held statutory language unconstitutional which did not specify the exact time of viability because such language created the

94. *Roe v. Wade*, 410 U.S. 113, 160 (1973).

Most courts, in their use of the term "viable" omit a discussion of (1) whether the unborn must be capable of living outside the womb independent of medical equipment such as incubators (although most would still label the premature child "viable" if an incubator were required); and (2) the length of time which the child must be able to survive. As used in this discussion, the term "viable" will refer to the infant capable of extra-uterine life for any length of time irrespective of the use of life-sustaining equipment.

95. 388 F. Supp. 631 (W.D. Ky. 1974).

96. *Id.* at 636.

97. 392 F. Supp. 1362 (E.D. Mo.) (three-judge court), *enforcement of statute stayed*, 420 U.S. 918, *cert. granted*, 96 S. Ct. 31 (1975).

98. 392 F. Supp. 1362, 1368 (E.D. Mo. 1975).

99. 378 F. Supp. 1008 (D. Minn. 1974).

100. 385 F. Supp. 255 (D.N. Dak. 1974).

101. 401 F. Supp. 554 (E.D. Pa. 1975).

possibility that a physician might be deterred from performing abortions prior to 24 weeks. The *Hodgson* court wrote:<sup>102</sup>

We do not accept the suggestion of defendants that the Supreme Court's comment on viability was only dicta . . . . It appears that the Court made its comments on viability to prevent the very thing which has happened here, which is the attempt to set viability by legislative definition and thereby, in effect, unreasonably interfere with what the Court determined to be a fundamental right.

The *Fitzpatrick* court also concluded:<sup>103</sup>

We believe that such a danger [of arbitrary prosecution] exists here for, without an objective standard to guide law enforcement officers . . . physicians will be subject to prosecution controlled only by the subjective determinations of those charged with law enforcement. The possibility of such arbitrary enforcement certainly will . . . inhibit and deter physicians from performing abortions after a fetus has reached the gestational age of 20 weeks. Such a limitation prior to the 24th week of gestation is inconsistent with the fundamental right of a pregnant woman to obtain an abortion without regard to the potential for fetal life within the second trimester of the pregnancy. We find that the Supreme Court in *Roe* intended to set the lowest limit at which viability may be deemed to occur at the 24 week period.

How the Supreme Court will ultimately resolve the ambiguity inherent in the definition of viability is unknown. It is clear, however, that at least until the point of viability is reached, the fetus does not have rights equivalent to the rights of a live born human being.

#### *Right of the Unborn to Support*

The inference has been drawn by commentators that if an unborn has the right to support from its father, the unborn is thereby recognized as the equivalent of a live-born child.<sup>104</sup> *People v. Yates*,<sup>105</sup> *People v. Sianes*,<sup>106</sup> and *Kyne v. Kyne*<sup>107</sup> are among the

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102. 378 F. Supp. 1008, 1016 (D. Minn. 1974).

103. 401 F. Supp. 554, 571 (E.D. Pa. 1975).

104. E.g., Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349 (1971).

105. 114 Cal. App. 782, 298 P. 961 (Super. Ct. 1931).

106. 134 Cal. App. 355, 25 P.2d 487 (1933).

107. 38 Cal. App. 2d 122, 100 P.2d 806 (1940).

cases cited as support for this inference. All three cases were brought under section 270 of the California Penal Code which provides:<sup>108</sup>

[A] parent of a minor child [who] willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance . . . is guilty of a misdemeanor . . . .

. . . .  
 . . . A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned.

In all three instances the fathers were held liable for failing to supply food and care to their unborn children "even though such food and care obviously [has] to be supplied to the child indirectly through its mother."<sup>109</sup>

Despite language which incontestably speaks of the right of the unborn to support, the impact of the above cases is very limited. *Kyne* does not stand for the proposition that a fetus is the equivalent of a born child inasmuch as the judgment rendered against the father ran only from the date of his child's birth<sup>110</sup> and it was in the interest of the mother that the court granted relief.<sup>111</sup> In addition, *Yates* and its progeny<sup>112</sup> are aberrant cases<sup>113</sup> which

lead to curious results. Such an infant ordinarily has no legal rights arising from injuries sustained through another's wrongdoing, civil or criminal. A legal outcast to this extent, it suddenly receives a right to support, and one that is protected by a criminal sanction, by merely tacking on a sentence to an existing code section.<sup>114</sup>

Case law does not recognize the right of the unborn to re-

108. CAL. PENAL CODE § 127 (West Cum. Supp. 1975).

109. *Kyne v. Kyne*, 38 Cal. App. 2d 122, 100 P.2d 806, 809 (1940).

110. 100 P.2d at 812.

111. See *People v. Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 n.12 (1969), cert. denied, 397 U.S. 915 (1970).

112. See, e.g., *Application of Clarke*, 149 Cal. App. 2d 802, 309 P.2d 142 (1957); *Briggs v. Stroud*, 52 Cal. App. 2d 308, 126 P.2d 409 (1942); *Kyne v. Kyne*, 38 Cal. App. 2d 122, 100 P.2d 806 (1940).

113. See GA. CODE ANN. § 74-9902 (Cum. Supp. 1975) on which the following cases rely and which has been interpreted to mean that a father can be held liable for support of his unborn child only where the abandonment which occurs before a live birth continues after the child is born: *Fairbanks v. State*, 105 Ga. App. 27, 123 S.E.2d 319 (1961); *Campbell v. State*, 20 Ga. App. 190, 92 S.E. 951 (1917); *Jackson v. State*, 1 Ga. App. 723, 58 S.E. 272 (1907); *Moore v. State*, 1 Ga. App. 502, 57 S.E. 106 (1907); *Bull v. State*, 80 Ga. 704, 6 S.E. 178 (1888).

114. 19 CALIF. L. REV. 552, 554 (1931).

ceive support from their parents. The law also denies the unborn the right to support from the government. The Supreme Court in *Burns v. Alcala*<sup>115</sup> held that the term "dependent child" as defined in section 406 (a) of the Social Security Act<sup>116</sup> does not include unborn children and, therefore, pregnant women are not entitled to receive benefits under the Act for their unborn children. The Court stated that on the basis of statutory interpretation "[w]e conclude that Congress used the word 'child' to refer to an individual already born, with an existence separate from its mother."<sup>117</sup>

### *Tort Law*

Throughout the past 90 years there have been drastic changes in tort law affecting the legal status and legal rights of the unborn. In 1884, Mr. Justice Holmes, in the landmark case of *Dietrich v. Northampton*,<sup>118</sup> held that even though a premature child lived for 10 to 15 minutes, no recovery was permitted by law for the injuries it sustained. Justice Holmes denied recovery to the administrator of the dead child's estate for two reasons: (1) there was no precedent for permitting recovery; and (2) "as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her."<sup>119</sup> More recently, however, Georgia has permitted recovery for the wrongful death of a "quick"<sup>120</sup> child even though the child was not born alive.<sup>121</sup>

While there has clearly been substantial change with respect to the treatment of the unborn in tort law,<sup>122</sup> a further analysis of

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115. 420 U.S. 575 (1975).

116. 42 U.S.C. § 606 (a) (1971).

117. *Burns v. Alcala*, 420 U.S. 575, 581 (1975).

118. 138 Mass. 14 (1884).

119. *Id.* at 17.

120. According to Georgia law, the fetus is considered a child when it is "quick"—capable of movement in the womb. The term "quick" is to be distinguished from the term "viable" which is commonly and most frequently used to indicate that stage of gestation at which the unborn is capable of extra-uterine life. For a discussion of "viable" see note 94 *supra* and accompanying text.

121. *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955).

122. It is important to note here that although medical science has made extraordinary advances in the area of prenatal studies since the 1800's and that, although the old notion of the child and its mother being one may no longer be valid, this change, even if appropriate, does not necessarily determine if the fetus is a person. The law may take cognizance of the medical realities, but in formulating the definition of "person" it

the development of the law in this area reveals that tort law, like criminal and property law, does not recognize that the legal rights of the unborn are equivalent to these of the live born. For example, permitting recovery for the wrongful death of an unborn does not indicate a court's recognition of a fetus' legal rights. Rather, recovery for the wrongful death of the unborn should be seen as a desire on the part of the judiciary to fulfill the purpose of tort law by providing compensation for the parents' loss of a "potential child." The Supreme Court recognized this when it emphasized in *Roe v. Wade*<sup>123</sup> that recovery is granted in tort cases because the survivors have suffered a loss, not because the unborn has any rights in itself justifying recovery:<sup>124</sup>

Such an action [wrongful death], however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life. . . . In short, the unborn have never been recognized in the law as persons in the whole sense.

The focus of tort law has always been compensation<sup>125</sup> and an award of damages in a tort action is a recognition of a loss resulting from some tort. The damages in wrongful death, for example, are a recognition of a legal right in the parents who have suffered a loss of their child; they do not bespeak a legal right in the tort victim per se. Thus, regardless of whether the child killed was 10 years old or merely a viable fetus, the award of damages reflects the same right of the parents not to have their child killed tortiously.

While in property and criminal law it is clear that live birth is required before individual rights are recognized, tort law is fraught with conflict over whether the unborn are to be afforded legal remedies and protection. Although the majority of courts in the area of tort law choose the point of viability rather than live birth at which to attach legal rights, they still focus on the potential life involved, and do not recognize legal rights in the unborn per se. Live birth is, however, clearly a prerequisite for recovery in the case of prenatal injuries.

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should not be bound by medical science. The use of the word "person" in law (as used, for example, in a wrongful death statute) is important in defining legal rights, not in deciding the eternally unresolved theological, ethical, philosophical, and medical question of "when does life begin?"

123. 410 U.S. 113 (1973).

124. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

125. W. PROSSER, *THE LAW OF TORTS* § 1, at 6 (4th ed. 1971).

Since the purpose of recovery in cases of prenatal injuries is to provide compensation for a child burdened with life-long infirmities, courts do allow recovery for prenatal injury if there is subsequently a live birth.<sup>126</sup> It would clearly be unfair to the *postnatal* child to refuse compensation merely because the injury occurred during the *prenatal* period. The intention in granting recovery in cases of this type is, however, to compensate the postnatal child for the affliction it must bear. Recovery is not, therefore, a recognition that the prenatal child has legal rights.<sup>127</sup>

At the present time there are at least 18 jurisdictions<sup>128</sup> permitting recovery for a prenatal injury<sup>129</sup> if, and only if, there is a

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126. *Id.* § 55.

127. The trend of the decisions today is to disregard the aspect of viability in an action to recover for prenatal injury and to focus instead on the live birth requirement. A New York Appellate Division decision was the first to reject the viability requirement. *Kelly v. Gregory*, 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1953). For other cases which also disregard viability as a prerequisite for the recovery of prenatal injuries see note 128 *infra*.

The rationale of these cases is that compensation should be given since, having been born alive, the affliction is no less severe simply because the injury occurred at a previable stage of gestation. This change should not be seen as a movement toward attaching legal rights to the unborn at all stages or, indeed, at any stage, since the very fact of the change indicates a focus on, and concern with, the postnatal child.

Furthermore, in many cases the viability cut-off point is being disregarded since the earlier the injury occurs in the process of development the more likely it is to cause serious harm. Thus, refusing to compensate for previable injury may well exclude the most meritorious claims.

128. *California*, *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678, *hearing denied*, 33 Cal. App. 2d 640, 93 P.2d 562 (1939); \**Connecticut*, *Tursi v. New England Windsor Co.*, 19 Conn. Supp. 242, 111 A.2d 14 (1955); \**District of Columbia*, *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946); *Georgia*, *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956); *Maryland*, *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951); *Massachusetts*, *Keyes v. Construction Serv. Inc.*, 340 Mass. 633, 165 N.E.2d 912 (1960); *Michigan*, *Womack v. Buchhorn*, 384 Mich. 718, 187 N.W.2d 218 (1971); *New Hampshire*, *Bennett v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958); *New Jersey*, *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *New York*, *Kelly v. Gregory*, 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1953); \**Ohio*, *Peterson v. Nationwide Mut. Ins. Co.*, 175 Ohio St. 551, 197 N.E.2d 194 (1964); \**Oregon*, *Mallison v. Pomeroy*, 205 Ore. 690, 291 P.2d 225 (1955); *Pennsylvania*, *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960); *Rhode Island*, *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222 (1966); \**South Carolina*, *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960); \**Tennessee*, *Shorsha v. Matthews Drivurself Service, Inc.*, 210 Tenn. 384, 358 S.W.2d 471 (1962); *Texas*, *Yandell v. Delgado*, 468 S.W.2d 475 (Tex. Civ. App. 1971); *Washington*, *Seattle-First Nat'l Bank v. Rankin*, 59 Wash. 2d 288, 367 P.2d 835 (1962) (en banc). Asterisk indicates the states requiring injury at or subsequent to viability.

129. The list of cases allowing recovery for prenatal injury if live birth occurs is not exhaustive. Those states not included within this category but which allow either for wrongful death of the stillborn or for wrongful death of the child born alive may also allow recovery for prenatal injury if specific requirements are met.

subsequent live birth. Of the 18 states here listed which permit recovery, only six make recovery contingent upon the fact that the unborn be viable at the time of the injury.<sup>130</sup> The abdication of the viability requirement in the majority of these jurisdictions does not evidence a concern for the nonviable unborn, but, rather, underscores the courts' interest in the postnatal child by focusing upon the need for those born alive to be compensated for their injuries.

While cases of recovery for prenatal injury focus upon the person injured, cases dealing with wrongful death are concerned with providing compensation for a decedent's survivors. In order to understand why wrongful death actions for the death of a viable fetus do not reflect legal rights in the unborn, it is necessary to examine an action for wrongful death as distinct from a survival action, both in terms of its nature and purpose.

Dean Prosser explains<sup>131</sup> that at common law the tort died with its victim and the survivors could not receive compensation for the wrong done. Inasmuch as there was no justifiable reason to refuse to allow monetary recovery to survivors, legislatures created survival and wrongful death actions.

In a survival action, designated representatives maintain the cause of action which the decedent could have enforced prior to death, including compensation for pain and suffering. Thus, in the case of instantaneous death, because there is no appreciable pain and suffering, there would be no basis for compensation on this ground. Since the survivors in such a situation would be remediless, wrongful death statutes were created to give a cause of action for the death itself.<sup>132</sup> Wrongful death statutes thus compensate the beneficiaries for the financial support that the decedent could have provided had death not occurred. In the case of the death of a fetus, the focus of these statutes is on the beneficiaries, not the unborn. It is clear that the earlier in pregnancy the death occurs, the more speculative must be the award. Since it is difficult to ascertain the monetary value of even a young child's life, it is much more difficult to do so for the unborn. The courts

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130. See note 128 *supra*.

131. W. PROSSER, *THE LAW OF TORTS* §§ 126, 127 (4th ed. 1971).

132. The purpose of giving a cause of action for death itself was to provide damages to the beneficiaries "in accordance with the purpose of compensating members of the family who might have expected to receive support or assistance from the deceased if he had lived." W. PROSSER, *THE LAW OF TORTS* § 127, at 904 (4th ed. 1971).

have not developed any sound criteria for measuring damages,<sup>133</sup> nor can they be assured that the fetus would have been free of physical or mental deficiencies had it been live born. Taking this difficulty into account, a wrongful death action, even for a still-born, does not recognize any inherent legal rights in the unborn, except insofar as the potential for earnings has been lost as a result of some tort.

Even where the primary purpose of a jurisdiction's wrongful death statute is not to provide compensation, one cannot necessarily conclude that the existence of the statute per se is a recognition of legal rights in the unborn.<sup>134</sup> For example, the court in *Eich v. Town of Gulf Shores*<sup>135</sup> determined that the purpose of the Alabama wrongful death statute,<sup>136</sup> which permits the award of damages for the death of a stillborn, is not to compensate for the loss of life, but, rather, to punish the wrongdoer.<sup>137</sup> The court deemed it illogical to punish only when the tort results in the death of a child subsequent to its live birth.<sup>138</sup> The decision also noted that a tort causing death prior to birth might well be a more serious offense than one which results in death some time after live birth. Inasmuch as the intent of the statute is to discourage the destruction of life in general (by means of punishment to tortfeasors), the court rightly concluded that recovery must be permissible both in cases of still and live birth. It should be noted here that Alabama's wrongful death statute is peculiar in having this purpose, since most jurisdictions desire not to punish the tortfeasors, but to compensate the beneficiaries for their loss.<sup>139</sup>

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133. See, e.g., *Graf v. Taggart*, 43 N.J. 303, 204 A.2d 140 (1964); *Stetson v. Easterling*, 274 N.C. 152, 161 S.E.2d 531 (1968); *Gay v. Thompson*, 266 N.C. 394, 146 S.E.2d 425 (1966); *Carroll v. Skloff*, 415 Pa. 47, 202 A.2d 9 (1964).

134. Since at common law the tort died with its victim (see text accompanying note 131 *supra*), the creation of wrongful death actions is a purely statutory right and, therefore, it is essential to discern the purpose of the given statute. That is, one cannot say that the existence of a wrongful death statute which applies to the unborn, by itself recognizes the unborn as having inherent legal rights. The example of the Alabama statute (see note 136 *infra* and accompanying text) makes clear that the unborn per se do not acquire rights merely because of the existence of the wrongful death statute.

135. 293 Ala. 95, 300 So. 2d 354 (1974).

136. ALA. CODE tit. 7, § 119 (1960).

137. *Eich v. Town of Gulf Shores*, 293 Ala. 95, 100, 300 So.2d 354, 358 (1974).

138. To substantiate its decision, the court theorized that in the case of twins who were injured during pregnancy, it would be "ludicrous" in terms of the intent of the statute (viz. to punish tortfeasors) to allow recovery for the live born and yet deny it for the stillborn. *Id.* at 399, 300 So. 2d at 357.

139. See note 124 *supra* and accompanying text.



Alabama is in the majority in permitting recovery for the wrongful death of an unborn. Most jurisdictions do require, however, that the fetus have been viable at the time of the injury.<sup>140</sup> This precondition to recovery is thus consistent with *Roe v. Wade*<sup>141</sup> which held that a state could find a compelling interest in the unborn at or after the point of viability. In five jurisdictions<sup>142</sup> recovery for wrongful death is limited to cases where the child is born alive and subsequently dies. Of these five having the stringent requirement of live birth, only Missouri demands as well that the unborn child be viable at the time of the injury.

At the present time 13 jurisdictions<sup>143</sup> refuse recovery for the wrongful death of a stillborn. None of these jurisdictions would permit recovery for a stillborn even though it had been viable at the time of injury. Pennsylvania, for example, refused to award damages for the wrongful death of a stillborn.<sup>144</sup> Money recovered in wrongful death actions is distributed in Pennsylvania according to intestate law and since, in intestate law, there is no estate from which to take without a live birth, the court in *Carroll v. Skloff*<sup>145</sup> held that requirement applicable in wrongful death as well. Thus, without live birth there can be no recovery. Furthermore, if recovery were permitted, the effect would be not only to punish the tortfeasor (since speculation about the value of the life would be so great) but also to give recovery where it is not needed

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140. See note 146 *infra*.

141. 410 U.S. 113, 163 (1973).

142. *Alabama*, Wolfe v. Isbell, 291 Ala. 327, 280 So. 2d 758 (1973); *California*, Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (Dist. Ct. App. 3d Dist. 1954); *Illinois*, Daley v. Meier, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961); *Massachusetts*, Torrigian v. Watertown News Co., 352 Mass. 446, 225 N.E.2d 926 (1967); *Missouri*, Steggall v. Morris, 363 Mo. 1224, 258 S.W.2d 577 (1953).

143. It should be noted that while these courts decline to give relief for the death of a stillborn, it does not follow that they will give relief if there is a live birth (although that may be the case). *Alaska*, Mace v. Jung, 210 F. Supp. 706 (D. Alas. 1962); *Arizona*, Kilmer v. Hicks, 22 Ariz. App. 552, 529 P.2d 706 (Ct. App. 1974); *Florida*, Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. Sup. Ct. 1968); *Iowa*, McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971); *Nebraska*, Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); *New Jersey*, Graf v. Taggett, 43 N.J. 303, 204 A.2d 140 (1964); *New York*, *In re Estate of Bradley*, 50 Misc. 2d 72, 269 N.Y.S.2d 657 (Sur. Ct. Nassau County 1966); *North Carolina*, Caldwell v. Welch, 25 N.C. App. 390, 213 S.E.2d 382 (1975); *Oklahoma*, Padillow v. Elrod, 424 P.2d 16 (Okla. Sup. Ct. 1967); *Pennsylvania*, Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964); *Tennessee*, Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433 (1963); *Texas*, Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820 (Tex. Sup. Ct. 1967) (recovery was denied even though the infant was born alive and lived for two days); *Virginia*, Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (Sup. Ct. App. 1969).

144. Carroll v. Skloff, 415 Pa. 47, 202 A.2d 9 (1964).

145. *Id.*

since the parents can recover for the loss of the child in their own actions.

The majority of jurisdictions that have dealt with the question of recovery for the death of a stillborn have permitted the action to lie.<sup>146</sup> It is important to note, however, that of the 22 jurisdictions in favor of such recovery, 20 compensate only for deaths of viable fetuses. In permitting recovery for the death of a viable unborn, the courts are focusing upon the need to compensate the parents for their loss of a potential life.<sup>147</sup>

Proponents of recovery for the wrongful death of a fetus maintain that the unborn is a living human being, and hence, the destruction of life in its fullest sense occurs with a fetal death.<sup>148</sup> It is neither illogical nor arbitrary to allow liability to depend upon whether death occurs just prior to or just after birth because the law must, and always does, set a determinative point at which legal rights inhere. That point, for the purposes of the law in wrongful death actions, is viability in the majority of jurisdictions.

The use of viability as the point at which recovery for wrong-

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146. \**Alabama*, *Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354 (1974). For a discussion of the reason that the Alabama courts allow recovery see notes 124 & 139 *supra* and accompanying text. \**Connecticut*, *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (1966); \**Delaware*, *Worgan v. Greggo & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557 (Super. Ct. 1956); \**District of Columbia*, *Simmons v. Howard Univ.*, 323 F. Supp. 529 (D.D.C. 1971); \**Georgia*, *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955); \**Illinois*, *Chrisafogeorgis v. Brandenburg*, 55 Ill. 2d 368, 304 N.E.2d 88 (1973); \**Indiana*, *Britt v. Sears*, 150 Ind. App. 487, 277 N.E.2d 20 (1972); \**Kansas*, *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); \**Kentucky*, *Rice v. Rizk*, 453 S.W.2d 732 (1970); \**Louisiana*, *Valence v. Louisiana Power & Light Co.*, 50 So. 2d 847 (La. Ct. App. 1951); \**Maryland*, *State v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964); \**Massachusetts*, *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916 (Mass. 1975); \**Michigan*, *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971); \**Minnesota*, *Pehrson v. Kistner*, 222 N.W.2d 334 (Minn. 1974); \**Mississippi*, *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); \**Nevada*, *White v. Yup*, 85 Nev. 527, 458 P.2d 617 (1969); \**New Hampshire*, *Poliquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); \**Ohio*, *Stidam v. Ashmore*, 109 Ohio App. 431, 167 N.E.2d 106 (1959). \**Oregon*, *Libbee v. Permanente Clinic*, 268 Ore. 258, 518 P.2d 636 (1974) (en banc); \**South Carolina*, *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); \**West Virginia*, *Panagopoulos v. Martin*, 295 F. Supp. 220 (S.D. W. Va. 1969); \**Wisconsin*, *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967). Asterisk indicates recovery was for the death of a viable fetus.

147. But see *O'Neill v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971) where the court reasoned that since there is a common law right to recover for prenatal injuries, it follows that recovery should be permitted for the wrongful death of a viable unborn. The court failed to realize that in the former situation recovery was conditioned upon live birth, while, in the latter, there was no birth upon which to grant recovery.

148. For a discussion of the right-to-life amendment see notes 176 to 183 *infra* and accompanying text.

ful death is conditioned is eminently practical in view of the fact that such recovery is primarily for pecuniary loss.<sup>149</sup> Since the factors necessary to determine earning potential are not clearly developed at early stages of gestation,<sup>150</sup> recovery for wrongful death prior to birth (or its functional equivalent—viability) would serve to punish the tortfeasor rather than to compensate the aggrieved. Clearly such a result is at odds with the whole purpose of tort law.

The language used by courts which have considered this problem indicates that the decision whether to allow recovery for the wrongful death of a stillborn turns on the court's interpretation of the word "person" as it appears in particular statutes. Even if a court determines that it was the intent of the legislature to include the unborn in the category of "person," it does not necessarily follow that an unborn has legal rights. The legislatures seek to compensate for the loss of life or the loss of potential life, and by so doing recognize a legal right in the survivors, not in the unborn.

Case law then, has not been totally consistent with respect to whether live birth is a condition precedent to recovery in tort actions. In cases involving prenatal injuries the courts are wholly in accord with property and criminal law in that they require live birth. Wrongful death actions, though not holding to the live-birth requirement, do, in the majority of jurisdictions, require that the child be viable at the time of injury. It can be seen, therefore, that both types of tort actions limit recovery to cases where there is either a live birth or its functional equivalent—viability. In restricting recovery to these instances the courts are focusing on the live-born child's need, or the parents' need for compensation, but in no sense could one say that the courts are recognizing any legal rights in the unborn in and of themselves. It seems that the most sensible way to understand this confusing body of law is to view it as the Supreme Court did in *Roe v. Wade*,<sup>151</sup> as an attempt to preserve the potential of human life while compensating those who have suffered a genuine

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149. See notes 144 & 145 *supra* and accompanying text.

150. For example, in *Stetson v. Easterling*, 274 N.C. 152, 161 S.E.2d 531 (1968), the court denied recovery for the wrongful death of a child even though the child lived for a few months. In refusing recovery, the focus of the court was on the pecuniary aspect of the wrongful death statute and since no loss could be shown for the death of such a young person, recovery was denied.

151. 410 U.S. 113 (1973).

loss. Thus, the position taken in *Roe*—that a state may find a compelling interest in the viable unborn—is consistent with the tort law prior and subsequent to its decision.

### *Court-Ordered Treatment for Pregnant Woman*

In determining whether the unborn have ever been accorded legal rights equivalent to those of the live born, attention must be given to cases where courts have ordered pregnant women to receive blood transfusions under the doctrine of *parens patriae*.<sup>152</sup> Such analysis is necessarily limited due to the paucity of cases dealing with the issue.

In *Hoener v. Bertinato*,<sup>153</sup> for example, injunctive relief was granted to give the county custody of the child subsequent to birth in order to ensure that the child would receive the necessary transfusions. The prospective parents had refused to authorize the transfusions on the ground that it violated their religious beliefs. In granting such relief, the court noted that:<sup>154</sup>

The parents' constitutional freedom of religion, although accorded the greatest possible respect, must bend to the paramount interest of the State to act in order to protect the welfare of a *child* and its right to survive.

In this case, although the relief was granted while the child was *in utero*, the court was ensuring the safety and well-being of the postnatal child. That this is true is evident from the fact that, absent the subsequent live birth of the child, such relief would serve no purpose. The interest in *Hoener* clearly was in the postnatal child.

In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*,<sup>155</sup> the New Jersey Supreme Court was faced with a somewhat different problem. Here, unlike in *Hoener*, relief was sought by the hospital to enable it to give the mother a transfusion during her pregnancy. The medical evidence established a probability that at some point in the pregnancy the expectant mother would hemorrhage, and that without a blood transfusion,

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152. For further discussion on the doctrine of *parens patriae* see Annot., 30 A.L.R. 2d 1138 (1953).

153. 67 N.J. Super. 517, 171 A.2d 140 (1961).

154. *Id.* at 522, 171 A.2d at 143 (emphasis added). The concern in *Hoener* is that the child be able to survive beyond a few hours or days and that no physical or mental handicaps develop as a result of the presence of antibodies in the infant's blood. Thus this area of the law, like tort law, is seeking to ensure the well-being of the live born child.

155. 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

both she and the fetus would die. The court found that either the need to save the life of the mother or the unborn would justify their intervention, but clearly indicated its belief that the unborn child is entitled to the law's protection.

In *Raleigh*, as in any case in which the court orders treatment of a pregnant woman, the concern of the court can be said to be the protection of the potential life and ultimately the health of the postnatal child. Despite the difference in the focus of the courts in *Raleigh* and *Hoener*, intervention by the court in either case would serve no purpose absent the subsequent live birth of the child.

### *Fetal Experimentation*

The Supreme Court in *Roe v. Wade*<sup>156</sup> did not address the question of proper medical procedures with regard to fetuses during pregnancy or to nonviable fetuses aborted alive. Consequently, the decision has stirred considerable controversy over what is permissible and what is proscribed fetal experimentation.<sup>157</sup>

Prompted by the ensuing debate, the National Science Foundation Authorization Act of 1974<sup>158</sup> banned fetal research and the National Research Service Awards Act of 1974<sup>159</sup> denied grants of funds for fetal research until a consensus on guidelines for fetal experimentation could be reached. *Roe* also generated state abortion statutes which prohibited experimentation on aborted fetuses and which were "designed to prohibit the same type of fetal research that had occurred prior to . . . liberalized abortion laws."<sup>160</sup> These statutes signify successful attempts by right-to-life antiabortion forces who seek to circumvent the impact of *Roe* by barring any practices which might further "legitimize" abortion practices.<sup>161</sup> These statutes, products of successful lobbying efforts, reflect the moral, philosophical, and religious ideologies

156. 410 U.S. 113 (1973).

157. See Gaylin & Lappé, *Fetal Politics: The Debate on Experimenting with the Unborn*, ATLANTIC, May 1975, at 66; Scarf, *The Fetus as Guinea Pig*, N.Y. Times, Oct. 19, 1975, § 6 (Magazine), at 13; Comment, *Fetal Experimentation: Moral, Legal and Medical Implications*, 26 STAN. L. REV. 1191 (1974).

158. Pub. L. No. 93-96, § 10, 87 Stat. 25 (1973).

159. 42 U.S.C. 289 l-1 note (Supp. 1975).

160. Comment, *supra* note 157, at 1207; see, e.g., CAL. HEALTH & SAFETY CODE § 25956 (West Supp. 1975); ME. REV. STAT. ANN. tit. 22, § 1574 (Cum. Supp. 1975).

161. See *Fetal Research: The Case History of a Massachusetts Law*, SCIENCE, Jan. 24, 1975, at 237.

of legislators and their constituents, not any judicial consensus that the unborn have rights.<sup>162</sup>

These statutes and recently promulgated HEW guidelines<sup>163</sup> reflect consensus on nothing more than a desire, based on moral and ethical concerns, for standards by which to regulate scientific research on fetal tissue. Despite the Supreme Court's declaration that the state has no compelling interest in the unborn prior to viability<sup>164</sup> (and then only an interest in the potentiality of life), legislators have been urged to ban experiments where *in vitro*<sup>165</sup> fertilization occurs, where there is a nonviable fetus *ex utero*, and where there is a previable *in utero* fetus whose mother has chosen to abort her pregnancy. Former HEW Secretary Caspar Weinberger rejected the recommendation made by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, that research on the nonviable fetus *ex utero* be prohibited, and approved regulations which permitted such research.<sup>166</sup> The result of the Commission's recommendation would have been "the anomalous [one] of requiring physicians to let fetuses die, only to be studied and experimented upon after death."<sup>167</sup> Certainly, a regulation which would ban all research on a nonviable fetus *ex utero*, including research directed toward the prolongation of the fetus' life, cannot convincingly be said to have been generated by a concern for protecting the unborn's right to life.

Criticism directed at fetal experimentation focuses primarily on moral and psychological factors. It has been noted, for instance, that "it is not difficult to imagine a woman desiring an abortion who is morally opposed to experimentation on the aborted fetus."<sup>168</sup> One commentator<sup>169</sup> would not oppose research in which a mother swallows an aspirin prior to an abortion proce-

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162. See Scarf, *supra* note 157.

[A]nti-abortion forces . . . as well as people who are simply opposed to this experimentation on moral and ethical grounds, have been pressing for legislation that will impede or halt fetal research entirely.

163. 45 C.F.R. § 46 (1975).

164. See *Roe v. Wade*, 410 U.S. 113, 163 (1973).

165. "In vitro fertilization" is defined as "any fertilization of human ova which occurs outside the body of a female, either through admixture of donor human sperm and ova or by any other means." 45 C.F.R. § 46.203 (1975).

166. 45 C.F.R. § 46 (1975).

167. Comment, *supra* note 157, at 1201.

168. *Id.* at 1203.

169. Scarf, *supra* note 157.

dures but would oppose an experiment on a nonviable fetus in which the fetal head was removed. Her position is not based on any consistent premise that the unborn have rights and she explicitly commented that "some types of scientific research . . . may simply not be worth the moral price they exact."<sup>170</sup> The articulated objections to fetal research reflect, then, a psychological repugnance to certain experiments rather than a firm consensus that the unborn have rights.

Although a ban on fetal research was imposed by HEW in August 1974,<sup>171</sup> it was lifted in August 1975<sup>172</sup> at which time regulations to govern fetal experimentation were promulgated by HEW.<sup>173</sup> These guidelines do not supersede pertinent state or local laws and fetal research projects remain subject to review by ethical advisory boards. In formulating its regulations HEW took into account a wide range of divergent views of research scientists, physicians, educators, lawyers, and representatives of the general public concerning the medical, legal, social, and ethical problems involved in fetal research.<sup>174</sup> By no means do these regulations constitute the final determination of the legal community regarding the rights of the unborn. Judicial doctrine on the issue is yet to be developed.<sup>175</sup>

### *Right-to-Life Amendment*

*Roe v. Wade*<sup>176</sup> did not recognize prenatal beings as "persons," and reiterated the prior holdings of lower courts that a fetus is not a person within the meaning of the fourteenth amendment.<sup>177</sup> Since the trend toward liberalizing restrictive abortion

170. *Id.* at 93.

171. 45 C.F.R. § 46 (1974).

172. 40 Fed. Reg. 33526 (1975).

173. 45 C.F.R. § 46 (1975).

174. See 40 Fed. Reg. 33528-52 (1975).

175. In *Commonwealth v. Charles*, Nos. 81821, 81822 (Super. Ct. Mass., filed July 22, 1975), four doctors are under indictment for "illegal dissection" as defined by an 1814 Massachusetts grave-robbing statute (MASS. ANN. LAWS ch. 272, § 71 (1968)). The researchers are really being prosecuted for experiments performed on fetuses *in utero* of pregnant mothers planning abortions. After the nonviable fetuses were aborted and had died, the investigators performed autopsies to find out if antibiotics to combat fetal syphilis, administered in therapeutic concentrations, would breach the placenta. Whether the court will deal directly with fetal rights in disposing of this case remains to be seen.

176. 410 U.S. 113 (1973).

177. See, e.g., *McGarvey v. Magee-Womens Hosp.*, 340 F. Supp. 751 (W.D. Pa. 1972); *Byrn v. New York City Health & Hosp. Corp.*, 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972).

laws began, there has been a movement to amend the Constitution in order to broaden the application of fourteenth amendment protections to fetuses from the moment of conception.<sup>178</sup>

The proposed right-to-life amendment is internally inconsistent with its alleged premise that all beings, born or unborn, are in all respects equal in the eyes of the law. If, as the drafters and supporters claim, the unborn have as much right to continue to live as the mother does, there can be no rational justification for permitting an abortion even in a medical emergency. Furthermore, such balancing is not permissible if both beings have equivalent legal rights. The criminal law does not condone the killing of an innocent person to save one's own life.<sup>179</sup> Thus abortion, even in an emergency, could not be sanctioned by the right-to-life supporters if they are to be consistent in their contention that the unborn and living have equivalent rights.

A further flaw in the argument in favor of a new amendment is the erroneous contention that lenient abortion laws deprive the unborn of their rights recognized at common law.<sup>180</sup> While it is true that at common law there were restrictions on abortions, these restrictions were imposed to prevent the loss of the mother's

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178. S.J. Res. 140, 94th Cong., 1st Sess. (1975):

Section 1. With respect to the right to life, the word 'person', as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, 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.

Sec. 2 This article shall not apply in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother.

Sec. 3 Congress and the several States shall have power to enforce this article by appropriate legislation within their respective jurisdictions.

S.J. Res. 141, 94th Cong., 1st Sess. (1975):

Section 1. With respect to the right to life, the word 'person', as used in this article and in the fifth and fourteenth articles of amendment to the Constitution of the United States, applies to all human beings, irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.

Section 2. No unborn person shall be deprived of life by any person: Provided, however, That nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Section 3. Congress and the several States shall have the power to enforce this article by appropriate legislation within their respective jurisdictions.

179. *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884).

180. *Louisell, Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A. L. Rev. 233, 240 (1969).



life, not to protect the unborn.<sup>181</sup> Prior to the twentieth century, abortion posed a greater threat to the mother's life than did child birth.<sup>182</sup> Quite the opposite is true today.<sup>183</sup> It is therefore reasonable to suppose that had abortion been as safe for the mother as it now is, no restrictions on it would have existed at common law. Thus, contrary to the position taken by the right-to-life supporters, the unborn had no right to life of which it has been deprived by lenient abortion laws.

### *Conclusion*

Critics of liberalized abortion laws and proponents of a right-of-life amendment argue that the fetus deserves the protection of the laws purportedly afforded it prior to the Supreme Court's decision in *Roe v. Wade*.<sup>184</sup> A review of the case law reveals, however, that the courts have never recognized the rights of the born and the unborn as equivalent. In general, the law considers live birth (or its functional equivalent—viability) the condition upon which all legal rights are predicated. Therefore, a right-to-life amendment, and not the Supreme Court ruling, would be an aberration.

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181. Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 418 (1968).

182. Greenhouse, *Constitutional Question: Is There a Right to Abortion?*, N.Y. Times, Jan. 25, 1970 § 6, (Magazine), at 90.

183. Newsday, Feb. 15, 1976 at 6.

184. 410 U.S. 113 (1973).