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NOTE

THE LAW AND THE UNBORN CHILD: THE LEGAL AND LOGICAL INCONSISTENCIES

I. Introduction

Within the past few years, the abortion controversy has generated a vast amount of literature,¹ litigation,² and legislation.³ In each case there has been much discussion about the morality of abortion as opposed to the alleged right of a woman to have an abortion if she so desires. To date, several abortion statutes have been declared unconstitutional⁴ and sixteen states have revised their laws to permit abortion.⁵ The result of these actions has been further confusion in an already inconsistent area of the law — the law with respect to the unborn child.

Several years ago, Professor Prosser made a rather dogmatic statement concerning the legal status of the unborn child:

[M]edical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law. The criminal law regards it as a separate entity, and the

1 Some of the more recent writings on abortion are, L. LADER, *ABORTION* (1966); *THE MORALITY OF ABORTION* (J. Noonan ed. 1970); Symposium: *Abortion and the Law*, 17 W. RES. L. REV. 369 (1965), reprinted in *ABORTION AND THE LAW* (Smith, ed. 1967); Symposium: *Abortion Law Reform*, 14 CATH. LAW. 180 (1968); Symposium: *Law, Morality, and Abortion*, 22 RUTGERS L. REV. 415 (1968); Byrn, *A Critical Look at Legalized Abortion*, 41 L. A. BAR BULL. 320 (1966); Byrn, *Abortion on Demand: Whose Morality?* 46 NOTRE DAME LAWYER 5 (1970); Byrn, *Abortion in Perspective*, 5 DUQUESNE L. REV. 125 (1966); GIANNELLA, *The Difficult Quest for a Truly Humane Abortion Law*, 13 VILL. L. REV. 257 (1968); Hughes, *England's Great Leap Backward — The Abortion Act, 1967*, 43 AUSTR. L. J. 12 (1969); Kindregan, *Abortion, The Law, and Defective Children: A Legal-Medical Study*, 3 SUFF. L. REV. 225 (1969); Kutner, *Due Process of Abortion*, 53 MINN. L. REV. 1 (1968); Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A.L. REV. 233 (1969); Means, *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y. L. F. 411 (1968); Noonan, *Amendment of the Abortion Law: Relevant Data and Judicial Opinion*, 15 CATH. LAW. 124 (1969); Noonan, *The Constitutionality of the Regulation of Abortion*, 21 HAST. L. J. 51 (1969); Stern, *Abortion: Reform and the Law*, 59 J. CRIM. L.C. & P.S. 84 (1968); Williams, *Euthanasia and Abortion*, 38 U. COLO. L. REV. 178 (1966); Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. CRIM. L.C. & P.S. 3 (1969).

2 Abortion statutes have been declared unconstitutional to some degree or another in California, the District of Columbia, and Wisconsin. *People v. Belous*, 80 Cal. Rptr. 354, 458 P.2d 194 (1969) (vagueness); *United States v. Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969) (vagueness); *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970) (constitutional right to abort an unquickered fetus).

3 Abortion statutes have recently been revised in some sixteen states. *Alaska*: ALASKA LAWS 1970 ch. 103; *Arkansas*: ARK. STAT. ANN. §§ 41-301 to 310 (1969); *California*: CAL. HEALTH & SAFETY CODE §§ 25950-54 (West 1969); *Colorado*: COLO. REV. STAT. ch. 40, §§ 2-50, 51 (Cum. Supp. 1969); *Delaware*: DEL. LAWS 1969, vol. 57, ch. 145; *Georgia*: GA. CODE ANN. §§ 26-1201 to 1203, 26-9920a, 21a, 25a (1969 Revision); *Hawaii*: House Bill No. 61 (1970); *Kansas*: KANSAS LAWS 1969 ch. 180, sec. 21-3407; *Maryland*: MD. CODE ANN. art. 43, § 149E (Supp. 1969); *New Mexico*: N.M. STAT. ANN. §§ 40A-5-1 to 5-3 (Supp. 1969); *New York*: NEW YORK LAWS 1970 ch. 127; *North Carolina*: N.C. GEN. STAT. ANN. § 14-45.1 (1969 Replacement Volume); *Oregon*: OREGON LAWS 1969 ch. 684, § 17; *South Carolina*: S.C. CODE ANN. § 16-87 (1970); *Virginia*: VA. CODE ANN. § 18.1-62.1 Supp. 1969; *Washington*: WASHINGTON LAWS 1970 ch. 3, second extraordinary session (approved by Nov., 1970 referendum).

4 See note 2 *supra*.

5 See note 3 *supra*.

law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. . . . All writers who have discussed the problem have joined . . . in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother. . . .⁶

Since that statement was made, what was once almost universal agreement as to the legal rights of the unborn child has become confusion, primarily due to the recent successful attacks on criminal abortion statutes. It seems that the law has put itself in the anomalous position of protecting the legal rights of one who is considered to have no legal right to live. Indeed, the justification of an abortion under the Model Penal Code proposal involves no judicial process and no representation of the public interest, the interest of the father, or the interest of the unborn child.⁷ Furthermore, eight states have gone beyond the Code proposal and have provided no cut-off point at all in their recent abortion statutes.⁸ In these states, the unborn child can be the subject of abortion at any moment of gestation. Can this position possibly be reconciled with the many rights that the unborn child enjoys in the other areas of the law?

It must be noted that in attempting to define the legal status of the unborn child, one is immediately confronted with semantic problems. Perhaps the use of the phrase "unborn child" is somewhat imprecise and even indicative of preconceived conclusions. But the use of terms like "embryo"⁹ or "fetus,"¹⁰ which may be medically precise, is grammatically awkward since they refer only to specific stages of gestation; and such words as "quick"¹¹ or "viable"¹² are equally

6 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 56, at 355 (3d ed. 1964).

7 The American Law Institute's Model Penal Code § 230.3(2) and (3) (Proposed Official Draft, 1962), provides:

(2) *Justifiable Abortion*. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) *Physicians' Certificates; Presumption from Non-Compliance*. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

8 Arkansas, Colorado (except in case of rape or incest), Georgia, Kansas, New Mexico, North Carolina, South Carolina, and Virginia. See statutes cited in note 3, *supra*.

9 Embryo: The unborn young "from conception until approximately the end of the second month" of gestation. STEDMAN'S MEDICAL DICTIONARY 515 (1966).

10 Fetus: "The unborn young . . . from the end of the eighth week to the moment of birth." *Id.* at 587.

11 A "quick child" is defined as a child "that has developed so that it moves within the mother's womb." BLACK'S LAW DICTIONARY 1415 (4th ed. 1968). "Quickening" is "the first motion of the *foetus* in the womb felt by the mother." *Id.*

12 "Viable" is a term "applied to a newly-born infant, and especially to one prematurely born . . . but in such a state of organic development as to make possible the continuance of its life." *Id.* at 1737. "Viability" means "capable of living" an independent existence outside the mother's womb. *Id.*

unclear since the law's use of such words reflects little, if any, consistency with current medical theories or even with the actual definitions of the words themselves. Thus, the phrase "unborn child" will be used in this note to describe all stages of gestation from conception to birth, and any reference to the other above-mentioned terms will reflect the actual definition of the term unless otherwise qualified by the context.

II. The Historical Framework

A. *The Law of Property and the Unborn Child*

The property rights of the unborn child are as old as the common law itself. Blackstone has stated:

An infant *in [sic] ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born. And in this point the civil law agrees with ours.¹³

Essentially, Blackstone was restating numerous prior decisions of the English courts delineating the property rights of the unborn child. In the case of *Wallis v. Hodson*,¹⁴ an English court, relying on the Roman civil law, as well as the common law, held that a posthumous child was entitled to an accounting of her father's intestate estate. The Lord Chancellor stated: "[B]oth by the rules of common and civil law, she [the unborn child] was, to all intents and purposes, a child, as much as if born in the father's life-time."¹⁵ Following the same reasoning in *Wallis*, a second English court, in *Doe v. Clarke*,¹⁶ interpreted the ordinary meaning of "children" in a will to include a child *en ventre sa mere*. The Lord Chief Justice stated: "I hold that an infant *en ventre sa mere*, who by the course and order of nature is then living, comes clearly within the description of 'children living at the time of his decease.'"¹⁷

Nevertheless, it appears that for some time many of the English courts considered the recognition of the unborn child in the law of property to be a rule of construction invoked for the benefit of the child. This contention was soon rejected, however, in the case of *Thellusson v. Woodford*¹⁸ where the court, addressing itself to this point, said: "Why should not children *en ventre sa mere*

13 W. BLACKSTONE, COMMENTARIES *130.

14 26 Eng. Rep. 472 (Ch. 1740). This was not the first reported case where the English courts protected the property rights of the unborn child. Earlier cases include *Marsh v. Kirby*, 21 Eng. Rep. 512 (Ch. 1634) (a gift of rents and profits from certain leases to a child *en ventre sa mere* held to be valid); *Hale v. Hale*, 24 Eng. Rep. 25 (Ch. 1692) (posthumous child held to be within the meaning of a trust created for testator's children who shall be living at his death); *Burdet v. Hopegood*, 24 Eng. Rep. 484 (Ch. 1718) (gift over to testator's cousin in case testator should leave no son at time of his death held not to have taken effect owing to birth of posthumous son).

15 26 Eng. Rep. at 473.

16 126 Eng. Rep. (C.P. 1795).

17 *Id.* at 618.

18 31 Eng. Rep. 117 (Ch. 1798).

be considered generally as in existence? They are entitled to all the privileges of other persons."¹⁹ The same court, in reply to the contention that a devise for the life of a child *en ventre sa mere* was void because such a child was a non-entity, said:

Let us see, what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. . . . He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian.²⁰

A few years after *Thellusson*, another English court went so far as to hold that an unborn child is within the meaning of a bequest of a trust to children "born in her [testatrix's] lifetime."²¹ In this case the court reasoned from past decisions that "born in the lifetime" and "living at the death" would both include a child *en ventre sa mere* since such a child was considered born for purposes of the law.²²

When the common law rules of property were adopted by the American courts, the English decisions remained persuasive precedent. In *Hall v. Hancock*,²³ the Supreme Judicial Court of Massachusetts dealt with the question of whether a grandchild born almost nine months after the death of the testator was entitled to share with his four brothers in a bequest of his grandfather. The bequest was to certain grandchildren "as may be living at my decease."²⁴ After stating that the jury was properly instructed that a child is to be considered *in esse* at a period commencing nine months prior to his birth, the court held that a child *en ventre sa mere* is within the description of "children living."²⁵

In 1869, the Supreme Court of Missouri was faced with the question of whether a contingent remainder could vest in an unborn child.²⁶ The court's answer was explicit: "A child unborn will now not only inherit all manner of estates, but take remainders, whether vested or contingent, as though living when the particular estate determined. . . ."²⁷

Several years later, the Indiana Supreme Court held that where a testator devised property to his daughter "and her children" and a child was *en ventre sa mere* at the time of the testator's death, the unborn child could take as a tenant in common with his own mother.²⁸ The unborn child, therefore, had equal right and title to the property with his mother.

19 *Id.* at 164.

20 *Id.* at 163.

21 *Trower v. Butts*, 57 Eng. Rep. 72 (Ch. 1823).

22 *Id.* at 74. The court relied heavily on the decision in *Doe v. Lancashire*, 101 Eng. Rep. 28 (K.B. 1792), where the court stated that it knew "of no argument, founded on law and natural justice, in favour of the child who is born during his father's life, that does not equally extend to a posthumous child." *Id.* at 37.

23 32 Mass. (15 Pick.) 255 (1834).

24 *Id.* at 257.

25 *Id.* at 257-58. *Accord*, *Crowles v. Crowles*, 56 Conn. 240, 13 A. 414 (1887); *Swain v. Bowers*, 91 Ind. 307, 158 N.E. 598 (1927); *King v. Rea*, 56 Ind. 1 (1877); *Mackie v. Mackie*, 230 N.C. 152, 52 S.E.2d 352 (1949); *In re Laird*, 85 Pa. 339 (1877).

26 *Aubuchon v. Bender*, 44 Mo. 560 (1869).

27 *Id.* at 568.

28 *Biggs v. McCarty*, 86 Ind. 352 (1882).

Similarly, the Supreme Court of North Carolina in 1907 held that a posthumous child inherits equally with her brothers and sisters as a tenant in common and that any attempted partition and sale of the property without the consent of the unborn child (or her guardian) is not effective against that child.²⁹ It was the court's opinion that the child's inheritance vested immediately upon the death of her father even though she was at the time still in her mother's womb. As the court said:

If we hold, as we must, that the inheritance vested immediately in the plaintiff, while *en ventre sa mere*, upon the death of the father, the conclusion must follow that such inheritance ought not be divested and the child's estate destroyed by judicial proceedings to which it was in no form or manner a party, and for which not even a guardian *ad litem* was appointed.³⁰

The property rights of the unborn child progressed to such a point that in 1938 the Supreme Court of Rhode Island held that a posthumous child was entitled to share in the income of a trust from the date of her father's death rather than from the date of her subsequent birth.³¹ In this case, it was the court's opinion that there was "no sound reason" for treating the posthumous child differently from her brothers and sisters in this matter.³²

In 1941, a New York court in *In re Holthausen's Will*³³ summed up the evolution of the law to that point concerning the property rights of the unborn child:

It has been the uniform and unvarying decision of all common law courts in respect of estate matters for at least the past two hundred years that a child *en ventre sa mere* is "born" and "alive" for all purposes for his benefit.³⁴

The last phase of the court's statement, indicating that the property rights of the unborn child will not be recognized if they are not to the benefit of that child, is a matter of dispute at the present time. It was pointed out earlier that the English courts have rejected such a construction. It seems, however, that some American courts still adhere to such a rule.³⁵ Nevertheless, many of the cases indicate that such a rule of construction is, as a practical matter, seldom followed. Thus, in *Barnett v. Pinkston*³⁶ a child *en ventre sa mere* at the time of her father's death was held to be a "living child" so that the remainder of an estate would vest in her at that time. However, no benefit ever accrued to the child since she died several hours after birth, leaving her mother as sole heir.³⁷ Again, in *In re*

29 *Deal v. Sexton*, 144 N.C. 157, 56 S.E. 691 (1907).

30 *Id.* at 158, 56 S.E. at 692; *accord*, *Botsford v. O'Conner*, 57 Ill. 72 (1870).

31 *Industrial Trust Co. v. Wilson*, 61 R.I. 169, 200 A. 467 (1938).

32 *Id.* at 176, 200 A. at 476.

33 175 Misc. 1022, 26 N.Y.S.2d 140 (Sur. Ct. 1941).

34 *Id.* at 1024, 26 N.Y.S.2d at 143.

35 *See In re Well's Will*, 129 Misc. 447, 221 N.Y.S. 714 (Sur. Ct. 1927); *In re Scanelli*, 208 Misc. 804, 142 N.Y.S.2d 411 (Sur. Ct. 1955); *In re Peabody*, 5 N.Y.2d 541, 158 N.E.2d 841, 186 N.Y.S.2d 265 (1959); *M'Knight v. Read*, 1 Whart. 213 (Pa. 1835).

36 238 Ala. 327, 191 So. 371 (1939).

37 *Accord*, *Catholic Mut. Ben. Ass'n v. Firnane*, 50 Mich. 82, 14 N.W. 707 (1883).

*Sankey's Estate*³⁸ a child *en ventre sa mere*, although entitled to share in the estate in question, was held to be bound by an adjudication against the other heirs which adversely affected the estate. The child was held to be a living heir although she gained no benefit from it.

Probably the best statement on this point came from an English court in 1903.³⁹ The court was confronted with an intricately worded devise whereby it was to the plaintiff's detriment to be considered "born" at the time of the testatrix's death and therefore take under the terms of the devise rather than by rules of descent. Judge Buckley, writing for the majority, stated:

In my judgment, therefore, the doctrine in question — by which a child *en ventre sa mere* is to be treated as existing for many purposes . . . is one which is applicable, not only where it is to the advantage of the child to apply it, or where it is immaterial to the child whether it is applied or not, but also where it is to the disadvantage of the child to apply it.⁴⁰

It seems clear, therefore, that the law of property recognizes the rights of the unborn child from the moment of conception for all purposes which affect the property rights of that child. The unborn child may be an actual income recipient prior to the time of his birth⁴¹ as well as a tenant in common with his own mother.⁴² He is considered an existing person at the time of his father's death and is thereby a beneficiary entitled to participate in any damages recovered in an action for the wrongful death of his father.⁴³ Likewise, the unborn child is recognized as a living heir for the purpose of taking any estate, whether by devise or by the statutes of descent. Some states have even gone to the extent of codifying this rule.⁴⁴ For example, section 250 of California's Probate Code provides that "a posthumous child is considered as living at the death of the parent." Similarly, section 255 of California's Probate Code, as amended in 1961, provides that an illegitimate child is the heir of his mother, whether the child is "born or conceived." There is little doubt, therefore, that the legal life of a human being begins at conception for purposes of the law of property.

B. *The Law of Torts and the Unborn Child*

The most recent and most dramatic developments relating to the unborn child have been in the law of torts.⁴⁵ It was the common law belief that the unborn child was part of the mother, and thus the child who had been harmed by negligent injury to his mother could not recover since the mother was the

38 199 Cal. 391, 249 P. 517 (1926).

39 *In re Wilmer's Trusts* [1903], 1 Ch. 874.

40 *Id.* at 888.

41 *Industrial Trust Co. v. Wilson*, 61 R.I. 169, 200 A. 467 (1938).

42 *Biggs v. McCarty*, 86 Ind. 352 (1882).

43 *Herndon v. St. Louis & S.F. R. Co.*, 37 Okla. 256, 128 P. 727 (1912).

44 *See, e.g.*, FLA. STAT. ANN. § 440.02(13) (1966); IDAHO CODE ANN. § 14-115, 32-102 (1948); OKLA. STAT. ANN. tit. 84, § 228 (West 1970).

45 *See* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 56 (3d ed. 1964). Excellent articles on the law of prenatal injuries include: Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579 (1965); Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PENN. L. REV. 554 (1962); Note, *The Law of Prenatal Injuries*, 37 U. COLO. L. REV. 271 (1965).

only "person" who had been injured. This view was reiterated by Mr. Justice Holmes, while still on the Massachusetts Supreme Court, in the first and most famous American case on the subject of prenatal injuries.⁴⁶ In this case, the child's mother, four or five months pregnant at the time, slipped and fell on a negligently maintained highway in the town of Northampton. There was evidence that the fall brought on a miscarriage and the prematurely born infant lived for only ten or fifteen minutes. The administrator of the dead child's estate sued the town for negligent maintenance of the highway. Justice Holmes, speaking for the court, held that the common law provided no remedy for such injuries and that "as the unborn child was 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."⁴⁷

A few years later, a further obstacle to recovery for prenatal injuries was presented by the case of *Walker v. Great Northern Railway Company*⁴⁸ in which it was suggested that to entertain such actions would subject the courts to impossible problems of proof and even fictitious suits.⁴⁹

These decisions were followed universally for a number of years, but their basic premise was questioned in 1900 by Judge Boggs in his dissenting opinion in *Allaire v. St. Luke's Hosp.*⁵⁰ Judge Boggs argued that a child should be considered a separate legal entity when he reaches the prenatal stage of viability at which he could survive apart from his mother. He took issue with the common law rule stated by Holmes a few years earlier:

[I]t is but to deny a palpable fact to argue there is but one life, and that the life of the mother. Medical science and skill and experience have demonstrated that at a period of gestation in advance of the period of parturition the foetus is capable of independent and separate life, and that though within the body of the mother, it is not merely a part of her body. . . .⁵¹

Although some courts took notice of this dissenting opinion, it was not followed during the early part of this century.⁵² Finally, in 1946, a federal district court in the case of *Bonbrest v. Kotz*⁵³ rejected the *Dietrich-Walker* rule and

46 *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884). There was an earlier Iowa case which held that a father could not recover damages for being deprived of offspring from one who performed an abortion on his wife, but the court, while expressing some doubt, specifically avoided the question of whether the plaintiff could have recovered on a claim for future services to be rendered after the birth of the child. *Kausz v. Ryan*, 51 Iowa 232, 1 N.W. 485 (1879).

47 *Dietrich v. Inhabitants of Northampton*, 138 Mass. at 17.

48 28 L.R. Ir. 69 (Q.B. 1891).

49 Another reason, probably the main reason, that the court denied recovery in this case was that there was no contractual relationship between the railroad and the infant. One author has styled this reasoning as "conceptualistic jurisprudence with a vengeance." 19 NACCA L.J. 232 (1957).

50 184 Ill. 359, 56 N.E. 638 (1900).

51 *Id.* at 370, 56 N.E. at 641.

52 See, e.g., *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 354, 78 S.W.2d 944, 946-47 (1935); *Lipps v. Milwaukee Elec. Ry. & Light Co.*, 164 Wis. 272, 274-75, 159 N.W. 916, 917 (1916).

53 65 F. Supp. 138 (D.D.C. 1946). There were a few earlier decisions of somewhat less notable influence: *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678 (Dist. Ct. App.), *aff'd per curiam*, 93 P.2d 562 (1939) (decision based on statute); *Cooper v. Blanck*, 39 So. 2d 352 (La. Ct. App. 1923) (civil-law decision); *Montreal Tramways Co. v. Leveille* [1933], 4 D.L.R. 337 (civil-law decision).

permitted recovery for a prenatal injury. *Bonbrest* involved a medical malpractice action. The infant plaintiff (a "viable child") sought recovery for injuries sustained while in the process of being "removed from his mother's womb." Noting the earlier decisions, including the opinion of Justice Holmes in *Dietrich*, the court stated:

As to a viable child being "part" of its mother — this argument seems to me to be a contradiction in terms. True it is in the womb, but it is capable now of extrauterine life — and while dependent for its continued development on sustenance derived from its peculiar relationship to its mother, it is not a "part" of the mother in the sense of a constituent element — as that term is generally understood. Modern medicine is replete with cases of living children being taken from dead mothers. Indeed, apart from viability, a non-viable fetus is not part of its mother.⁵⁴ (Emphasis added.)

As to the difficulty of proof of such prenatal injuries, the court stated: "The law is presumed to keep pace with the sciences and medical science certainly has made progress since 1884. We are concerned here only with the right and not its implementation."⁵⁵

More than any other case, *Bonbrest* has proven to be the landmark decision in the area of prenatal injuries. The importance of *Bonbrest*, besides being what Prosser termed "the most spectacular abrupt reversal of a well-settled rule in the whole history of the law of torts,"⁵⁶ was that it established viability as the *minimum* point at which recovery should be allowed.⁵⁷ With viability as the test for recovery, the *Dietrich-Walker* rule has been so widely repudiated that only two jurisdictions that considered the question prior to *Bonbrest* have not yet overruled their pre-*Bonbrest* decisions.⁵⁸ At the present time, the right to recover for prenatal injuries has been recognized by twenty-nine states⁵⁹ and the District of

54 65 F. Supp. at 140.

55 *Id.* at 143.

56 W. PROSSER, *supra* note 45, at 354.

57 "Here, however, we have a viable child — one capable of living outside the womb — and which has demonstrated its capacity to survive by *surviving* — are we to say *now* it has no locus standi in court or elsewhere?" *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D.D.C. 1946).

58 Alabama and Michigan have not yet overruled prior decisions. *Stanford v. St. Louis-San Francisco Ry. Co.*, 214 Ala. 611, 108 So. 566 (1926); *Newman v. City of Detroit*, 281 Mich. 60, 274 N.W. 710 (1937).

59 *California*: *Scott v. McPheeters*, 33 Cal. App. 2d 629, 92 P.2d 678 (Dist. Ct. App. 1939), *aff'd per curiam*, 93 P.2d 562 (1939) (decision based on statute); *Connecticut*: *Tursi v. New England Windor Co.*, 19 Conn. Supp. 242, 111 A.2d 14 (Super. Ct. 1955); *Delaware*: *Worgan v. Gregg & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557 (1956); *Georgia*: *Tucker v. Howard L. Carmichael & Sons, Inc.*, 208 Ga. 201, 65 S.E.2d 909 (1951); *Fallow v. Hobbs*, 113 Ga. App. 181, 147 S.E.2d 517 (1966); *Illinois*: *Amann v. Faigy*, 415 Ill. 422, 114 N.E.2d 412 (1953); *Rodriguez v. Patti*, 415 Ill. 496, 114 N.E.2d 721, *rev'd* 348 Ill. App. 322, 108 N.E.2d 830 (1952); *Iowa*: *Wendt v. Lillo*, 182 F. Supp. 56 (D.C. Iowa 1960) (applying Iowa law); *Kansas*: *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Kentucky*: *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Louisiana*: *Cooper v. Blanck*, 39 So. 2d 352 (La. Ct. App. 1923); *Maryland*: *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951); *Massachusetts*: *Keyes v. Construction Service, Inc.*, 340 Mass. 633, 165 N.E.2d 912 (1960); *Minnesota*: *Verkennes v. Cornica*, 229 Minn. 365, 38 N.W.2d 838 (1949); *Mississippi*: *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *Missouri*: *Steggall v. Morris*, 363 Mo. 1224, 258 S.W.2d 577 (1953); *Nevada*: *White v. Yup*, 458 P.2d 617 (Nev. 1969); *New Hampshire*: *Poliquin v. MacDonald*, 101 N.H. 104, 135 A.2d 249 (1957); *New Jersey*: *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960); *New York*: *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691 (1951); *Kelly v. Gregory*, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953); *North Carolina*: *Stetson v. Easterling*, 274 N.C. 152, 161 S.E.2d 531 (1968) (action would

Columbia.⁶⁰ Compensation for prenatal injuries has also been allowed under the Federal Tort Claims Act in an action against the United States.⁶¹

A few states have consistently denied recovery on the grounds that such a cause of action can only be authorized by the legislature because it did not exist at common law.⁶² Such a theory, however, seems to be unfounded since the former rule denying recovery was really a judicial, rather than a legislative, rule to begin with. The Ohio Supreme Court strongly refuted such reasoning some twenty years ago when it stated: "No legislative action is required to authorize recovery for personal injuries caused by the negligence of another. Such right was one existing at common law."⁶³ Other courts have recognized the right of recovery for prenatal injuries even in those cases in which causal connection is most difficult to establish.⁶⁴ Furthermore, the trend at the present time is to allow recovery without regard to whether or not the child was viable at the time the injury was inflicted. The 1953 New York Supreme Court Appellate Division decision in *Kelly v. Gregory*,⁶⁵ which dealt with an injury to an unborn child in the third month of pregnancy, was the first to reject viability as the point at which the rights of the unborn child begin. The court's opinion reflects the increasing knowledge of medical science:

While the point at which the foetus becomes viable has been of usefulness in drawing some legal distinctions, the underlying problem that has usually troubled the Judges who have written on the subject of recovery for prenatal injuries, has been in fixing the point of legal separability from the mother.

We ought to be safe in this respect in saying that *legal separability should begin where there is biological separability*. We know something more of the actual process of conception and foetal development now than when some of the common law cases were decided; and what we know makes it possible to demonstrate clearly that *separability begins at conception*.⁶⁶ (Emphasis added.)

have been maintainable if child had lived or if damages resulting from the death could have been proved); *Ohio*: *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 87 N.E.2d 334 (1949); *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*, 220 A.2d 222 (R.I. 1966); *South Carolina*: *Hall v. Murphy*, 236 S.C. 257, 113 S.E.2d 790 (1960); *Tennessee*: *Shousha v. Matthews Driveurself Serv., Inc.*, 210 Tenn. 384, 358 S.W.2d 471 (1962); *Texas*: *Leal v. C. C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820 (Tex. 1967); *Washington*: *Seattle-First Nat'l Bank v. Rankin*, 59 Wash.2d 288, 367 P.2d 835 (1962); *West Virginia*: *Panagopoulos v. Martin*, 295 F. Supp. 220 (D.C. W. Va. 1969) (wrongful death action applying West Virginia law); *Wisconsin*: *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis.2d 14, 148 N.W.2d 107 (1967).

60 *Bonbreast v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946).

61 *Sox v. United States*, 187 F. Supp. 465 (E.D. S.C. 1960) (\$260,000 damages awarded to a child who was unable to see, talk, use limbs, or control muscles as a result of prenatal injuries inflicted during the sixth month of gestation).

62 *Michigan* is one such state. *Newman v. City of Detroit*, 281 Mich. 60, 274 N.W. 710 (1937). However, a recent decision by the Michigan Court of Appeals, *Marlow v. Krapek*, 20 Mich. App. 489, 174 N.W.2d 172 (1969), in which a child sued for prenatal injuries inflicted only eight hours before birth, may reverse the trend in that state. The court of appeals noted that Michigan's prior holdings were against the weight of authority, but held that only the state supreme court could reverse such decisions.

63 *Williams v. Marion Rapid Transit, Inc.*, 152 Ohio St. 114, 128, 87 N.E.2d 334, 340 (1949).

64 See, e.g., *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951) (child born blind); *Mallison v. Pomeroy*, 205 Ore. 690, 291 P.2d 225 (1955) (child developed cerebral palsy); *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960) (child born a Mongoloid).

65 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

66 *Id.* at 543-44, 125 N.Y.S.2d at 697.

Since *Kelly*, a number of courts have recognized that the basis for recovery in tort is causation—not some theory of separability that begins at the highly relative point at which a child becomes viable.⁶⁷ All logic is in favor of ignoring the stage at which an injury occurs to the human child *in utero*.⁶⁸ The argument was well stated by the Pennsylvania Supreme Court ten years ago:

As for the notion that the child must have been viable when the injuries were received, which has claimed the attention of several of the states, we regard it as having little to do with the basic right to recover, when the foetus is regarded as having existence as a separate creature from the moment of conception.⁶⁹

No doubt more courts will recognize the inherent problem in a position which allows recovery only to the viable unborn child. Indeed, it has been said that judicial disallowance of actions for injuries to the non-viable child may well be a denial of the most meritorious claims⁷⁰ and a potential for injustice.⁷¹ Certainly the closer one gets to the estimated time of conception, the more difficult will the plaintiff's burden of proof become, but this should not defeat the right of action if that casual link between the plaintiff's condition and the defendant's wrongful act can be established. The courts seem to have recognized this fact, and the viability limitation in prenatal injury cases appears to be headed for oblivion.

A further development in the law of torts has been the recognition of the right to maintain an action for the wrongful death of a child resulting from prenatal injuries. Where the child is born alive and then subsequently dies as a result of injuries received prior to birth, the courts which have considered the question are almost unanimous in allowing the child's estate to bring an action for wrongful death.⁷² Although the cause of action for wrongful death is purely statutory, the child born alive has always been considered a "person" regardless of how short a time he actually survives. Thus, in *Torigian v. Watertown News Co.*,⁷³ the Massachusetts court allowed recovery on behalf of an infant who died

67 At least nine states have now rejected the viability distinction in allowing recovery for prenatal injuries: *Georgia*: *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 93 S.E.2d 727 (1956) (one month); *Illinois*: *Daley v. Meier*, 33 Ill. App. 2d 218, 178 N.E.2d 691 (1961) (one month); *Massachusetts*: *Torigian v. Watertown News Co.*, 352 Mass. 446, 225 N.E.2d 926 (1967) (3½ months); *New Hampshire*: *Bennet v. Hymers*, 101 N.H. 483, 147 A.2d 108 (1958) (non-viable); *New Jersey*: *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497 (1960) (six months); *New York*: *Kelly v. Gregory*, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953) (three months); *Pennsylvania*: *Sinkler v. Kneale*, 401 Pa. 267, 164 A.2d 93 (1960) (one month); *Rhode Island*: *Sylvia v. Gobeille*, 220 A.2d 222 (R.I. 1966) (non-viable); *Wisconsin*: *Puhl v. Milwaukee Auto. Ins. Co.*, 8 Wis. 2d 343, 99 N.W.2d 163 (1959) (suggested that viability would make no difference in this state, but dismissed the case for lack of proof that injuries inflicted at twelfth week of pregnancy caused plaintiff to be born a Mongoloid); see also, *Damasiewicz v. Gorsuch*, 197 Md. 417, 79 A.2d 550 (1951), where no reference to viability is made.

68 W. Prosser, *supra* note 45, at 356.

69 *Sinkler v. Kneale*, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960).

70 Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PENN. L. REV. 554, 563 (1962).

71 Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 589 (1965).

72 See cases cited at note 59 *supra*. All of these states appear to allow an action for wrongful death on behalf of the child born alive with the exception of North Carolina, where the sole basis for recovery in any wrongful death action is provable pecuniary damages. It appears that if the parents could somehow prove such damages, the cause of action would be allowed.

73 352 Mass. 446, 225 N.E.2d 926 (1967).

2½ hours after birth as a result of injuries sustained during the fourth month of gestation.

The most significant developments in the evolution of the unborn child's rights in tort are those decisions which allow the parents, or survivors, to maintain a wrongful death action where the child is stillborn.⁷⁴ In these cases, the unborn child to whom live birth never comes is held to be a "person" who may be the subject of an action for damages arising from his death.⁷⁵ At the present time, sixteen states have decided that a cause of action exists for the wrongful death of a child who is stillborn.⁷⁶ In one such state, Connecticut, a court stated:

To deny the infant or its representative relief in this type of case is not only a harsh result but its effect is to do reverence to an outmoded, timeworn fiction not founded on fact and within common knowledge untrue and unjustified.⁷⁷

In the most recent decision on this point, the Nevada Supreme Court concluded:

It is no less a loss to the survivors where, as here, the child died before birth; and it is clear that the Legislature intended that whatever loss there is should be compensated. Respondent's argument that damages would be difficult of proof does not go to the validity of a cause of action.⁷⁸

The present weight of authority favoring recovery for the wrongful death of a stillborn child⁷⁹ leads to the conclusion that those states which have denied

⁷⁴ See Annot., 15 A.L.R.3d 992 (1967).

⁷⁵ *Louisell, Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A.L. Rev. 233, 244 (1969).

⁷⁶ *Connecticut*: *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 224 A.2d 406 (1966); *Gorke v. LeClerc*, 23 Conn. Supp. 256, 181 A.2d 448 (1962); *Delaware*: *Worgan v. Greggo & Ferrara, Inc.*, 50 Del. 258, 128 A.2d 557 (1956); *Georgia*: *Porter v. Lassiter*, 91 Ga. App. 712, 87 S.E.2d 100 (1955); *Iowa*: *Wendt v. Lillo*, 182 F. Supp. 56 (N.D. Iowa 1960) (applying Iowa law); *Kansas*: *Hale v. Manion*, 189 Kan. 143, 368 P.2d 1 (1962); *Kentucky*: *Mitchell v. Couch*, 285 S.W.2d 901 (Ky. 1955); *Louisiana*: *Valence v. Louisiana Power & Light Co.*, 50 So. 2d 847 (La. App. 1951); *Cooper v. Blanck*, 39 So. 2d 352 (La. App. 1923) (dictum); *Maryland*: *State ex rel. Odham v. Sherman*, 234 Md. 179, 198 A.2d 71 (1964); *Minnesota*: *Verkennes v. Corniea*, 229 Minn. 365, 38 N.W.2d 838 (1949); *Mississippi*: *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954); *Nevada*: *White v. Yup*, 458 P.2d 617 (Nev. 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); *South Carolina*: *Fowler v. Woodward*, 244 S.C. 608, 138 S.E.2d 42 (1964); *West Virginia*: *Panagopoulous v. Martin*, 295 F. Supp. 220 (S.D. W.Va. 1969) (applying West Virginia law); *Wisconsin*: *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis. 2d 14, 148 N.W.2d 107 (1967); see also, *Gullborg v. Rizzo*, 331 F.2d 557 (3d Cir. 1964), upholding recovery for wrongful death of stillborn child, applying Pennsylvania law on first impression. However, a later case decided by the Pennsylvania Supreme Court held the opposite view. *Carroll v. Skloff*, 415 Pa. 47, 202 A.2d 9 (1964).

⁷⁷ *Hatala v. Markiewicz*, 26 Conn. Supp. 358, 360, 224 A.2d 406, 407 (1966).

⁷⁸ *White v. Yup*, 458 P.2d 617, 623 (Nev. 1969).

⁷⁹ The annotation on this subject in 15 A.L.R.3d 992 (1967) lists only eleven states that have denied recovery for the wrongful death of a stillborn child, while, as indicated above, sixteen states have permitted recovery. In addition to those twenty-seven states that have taken a particular side in the controversy, two other states have considered the question. In *Mace v. Jung*, 210 F. Supp. 706 (D.C. Alaska 1962), the court held that there could be no recovery on behalf of a non-viable stillborn child. But the court clearly suggests that there would exist a cause of action on behalf of a viable stillborn child. Similarly, in *Acton v. Shields*, 386 S.W.2d 363 (Mo. 1965), the court held that the aunt and uncle of an unborn child did not have a cause of action for wrongful death because they could prove no pecuniary damages. However, if the action "was brought by the father of a deceased infant," said the court, "it might present a different question." *Id.* at 367.

recovery may well reconsider their position in the near future.⁸⁰ Indeed, it seems inconsistent for a jurisdiction to permit recovery for prenatal injuries to the child born alive but to deny recovery to a child whose prenatal injuries inflicted by the tortfeasor are severe enough to cause stillbirth.⁸¹ As the Maryland Supreme Court observed: "The cause of action arose at the time of the injury, and . . . [there is] no more reason why it should be cut off because of the child's death before birth, than if it died thereafter."⁸²

Consequently, in recognizing a cause of action for injury inflicted before birth, the law has recognized the legal interests and personality of the unborn child. The courts realize that "[m]edical authorities have long recognized that a child is in existence from the moment of conception."⁸³ If one accepts the trend of modern tort cases, he must conclude that Professor Prosser was correct—"the unborn child in the path of an automobile is as much a person in the street as the mother."⁸⁴

C. Equity and the Unborn Child

Equity has, on occasion, become involved with the rights of the unborn child. While there appear to be few reported cases in which the English equity courts were called upon to decide the rights of the unborn child, there is some mention made of *Lutterel's* case in which an injunction was granted on behalf of an infant *en ventre sa mere* to prevent waste.⁸⁵ There is also the 1678 case of *Hyde v. Seymour*⁸⁶ in which the court decided that an unborn child was entitled to a share of the profits of a trust established for the deviser's children. For the most part, however, equity's protection of the unborn child is a rather recent development in the law.

In *Kyne v. Kyne*,⁸⁷ an unborn child came before the court by a guardian *ad litem* for the purpose of compelling the father to provide support. The court held that the child had such a right and that the father had such a duty.⁸⁸ The

80 Michigan is one of those states that has up to now denied recovery for the wrongful death of an unborn child; but has apparently done so at the cost of some internal inconsistency. The problem stems from the fact that while the Michigan court has denied that an unborn child is a "person" within the meaning of that state's wrongful death statute, *Estate of Powers v. City of Troy*, 4 Mich. App. 572, 145 N.W.2d 418 (1966), *aff'd*, 380 Mich. 160, 156 N.W.2d 530 (1968), the same court has held that an unborn child is a "person" within the meaning of that state's "dram shop" act and was thus allowed to bring an action for loss of support occasioned by the death of the child's father. *LaBlue v. Specker*, 358 Mich. 558, 100 N.W.2d 445 (1960). The explanation of the court was that the latter case was essentially decided under the rules of property law while the former was one in tort.

81 Before the enactment of the wrongful death statutes in the late 1800's, a somewhat similarly ironical situation existed in the law of torts with regard to all persons. If the claimant was simply injured, he could recover damages; but if he died, the cause of action was said to die with him. Thus, it was rumored that the fire axes carried by railroad coaches were actually intended for use on those passengers who were merely injured in a train accident. W. PROSSER, *supra* note 45, at 924.

82 *State ex rel. Odham v. Sherman*, 234 Md. 179, 198 A.2d 71, 73 (1964).

83 *Smith v. Brennan*, 31 N.J. 353, 362, 157 A.2d 497, 502 (1960).

84 W. PROSSER, *supra* note 45, at 355.

85 Cited in *Hale v. Hale*, 24 Eng. Rep. 25, 26 (Ch. 1695).

86 22 Eng. Rep. 1046 (Ch. 1678); *see also*, *Gibson v. Gibson*, 22 Eng. Rep. 1173 (Ch. 1698).

87 38 Cal. App. 2d 122, 100 P.2d 806 (1940).

88 *Accord*, *People v. Yates*, 114 Cal. App. 782, 298 P. 961 (1931); *Metzger v. People*, 98 Colo. 133, 53 P.2d 1189 (1936).

rationale of such a decision is based primarily on the rights that the unborn child has always enjoyed in property law.

More crucial decisions, bearing directly on the unborn child's right to life, have been handed down during the past decade. In one such instance,⁸⁹ where there was a possibility that a child might be born a "blue baby," it was held that the state, in the interest of the child's welfare, had a right to authorize the hospital to give lifesaving transfusions, even though the parents objected on religious grounds. The court made it quite clear that the state, pursuant to its *parens patriae* jurisdiction, not only had a right but also a *duty* to protect the children within its jurisdiction—including an unborn child—*notwithstanding* the wishes of the parents. Another such case, perhaps the most noteworthy one on equity's protection of the unborn child, is *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*.⁹⁰ The New Jersey Supreme Court was asked to decide whether a pregnant Jehovah's Witness could be compelled to submit to a blood transfusion when such transfusions were contrary to her religious beliefs. The court, admitting that it was a "difficult question,"⁹¹ unanimously decided that the unborn child was entitled to the law's protection, and ordered the transfusions. The court stated:

In *State v. Perricone* . . . we held that the State's concern for the welfare of an infant justified blood transfusions notwithstanding the objection of the parents who were also Jehovah's Witnesses, and in *Smith v. Brennan* . . . we held that a child could sue for injuries negligently inflicted upon it prior to birth. We are satisfied that *the unborn child is entitled to the law's protection* and that an appropriate order should be made to insure blood transfusions to the mother in the event that they are necessary in the opinion of the physician in charge at the time.⁹² (Emphasis added.)

It is interesting to note that the New Jersey Supreme Court did not rest its decision in *Anderson* on the principle that the state could compel the transfusions in order to save the life of the woman. Instead the court held that the transfusions were to be given in order to save the life of the unborn child. The unborn child's right to live could not be negated by the mother's asserted constitutional right of religious expression; the child's right to life was paramount. In a subsequent New Jersey case in 1967,⁹³ the parents of a child born with serious defects in sight, hearing, and speech brought suit against their obstetrician for failure to advise them of the risk of birth defects where the mother had contracted German measles during pregnancy. The parents of the child sought to recover damages for the emotional distress and the added financial burden of rearing a defective child. The parents' theory was that if the doctor had told them of the risks, they would have procured an abortion and thereby have avoided the emotional and financial burdens. The court rejected the parents' claim on the ground that the

89 *Hoener v. Bertinato*, 67 N.J. Supp. 517, 171 A.2d 140 (Juv. Ct. 1961).

90 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

91 See Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *In re Estate of Brooks*, 32 Ill.2d 361, 205 N.E.2d 435 (1965). Both of these decisions, although decided in retrospect, seem to suggest that a non-pregnant adult of sound mind may refuse a blood transfusion and choose to die.

92 *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 423, 201 A.2d 537, 538.

93 *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967).

unborn child's right to life was of greater importance than the interest of the parents in being free from emotional and financial injury. The majority of the court stated the case in this manner:

It is basic to the human condition to seek life and hold onto it however heavily burdened. If Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects as against no life at all. "For the living there is hope, but for the dead there is none." Theocritus.⁹⁴

What these cases indicate is that the unborn child not only has a recognized legal right to own property and to be free from negligent injury or death at the hands of a tortfeasor, but also that he has a recognized legal right to life itself.⁹⁵ The law has protected the life of the unborn child against the assertion of such a fundamental constitutional right as the freedom of religion. Undoubtedly, the reason is that the law has recognized a countervailing constitutional right belonging to the unborn child.

D. *The Criminal Law and the Unborn Child*

Any consideration of the criminal law's recognition of the unborn child must take a twofold approach involving both criminal abortion and homicide.

One of the earliest references to the criminal nature of abortion was by the thirteenth-century English jurist, Henry Bracton. Bracton wrote: "If there be any one who strikes a pregnant woman or gives her a poison whereby he causes an abortion, if the foetus be already formed or animated, and especially if it be animated, he commits homicide."⁹⁶ There seem to be no reported cases, however, supporting Bracton's view that the malicious destruction of a viable fetus is murder—unless, of course, it had been born alive and then subsequently died. The "born-alive" rule has been associated most frequently with the writings of Sir Edward Coke. Coke observed:

If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.⁹⁷

In the eighteenth century, Blackstone reiterated the position set forth by Coke:

⁹⁴ *Id.* at 30, 227 A.2d at 693.

⁹⁵ This right to life is also evident from the fact that from the early common law to the present day the law has provided for the suspension of execution of pregnant women sentenced to death. Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A.L. Rev. 233, 240 (1969).

⁹⁶ BRACTON, *THE LAWS AND CUSTOMS OF ENGLAND*, III, ii, 4, quoted and translated in 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, 419 (1968).

⁹⁷ 3 COKE, *INSTITUTES* *58 (1648).

Life is the immediate gift of God . . . and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offense in quite so atrocious a light but merely as a heinous misdemeanor.⁹⁸

The common law rule that the unborn child could not be the subject of homicide was therefore well established.⁹⁹ In fact, at common law the abortion of an unborn child prior to quickening was no crime at all if the woman consented; if the woman did not consent to the abortion, the offense was merely an assault and battery.¹⁰⁰

As a result of the development of the common law theory, statutory protection of the unborn child became a necessity. In 1803, England enacted its first abortion statute, the Miscarriage of Women Act.¹⁰¹ This Act largely abolished the common law rule, but it retained a distinction between the quickened and the unquickened child in determining the severity of the punishment. The law condemned the willful, malicious, and unlawful use of any medical substance with the intent to induce an abortion, without regard to whether the attempt was successful, or whether the mother died as a result.¹⁰² Parliament recognized a justifiable interest in protecting the life of the unborn child; and the statute made abortion ("willfully and maliciously") a *felony* in every case, but punishable by death only if the medical substance was administered after quickening. The Act was subsequently amended in 1828, again in 1837, and finally incorporated into the Offenses Against the Persons Act of 1861.¹⁰³ By this time the law was settled in England that the killing of an unborn child was a felony regardless of whether the child had "quickened."

Much the same pattern developed in the United States. In 1797, a Pennsylvania court, adhering to the common law rule, held that it was necessary to prove that a child was born alive in order to support a murder indictment since an unborn child or a child born dead could not be the subject of homicide.¹⁰⁴

Similarly, the many cases that considered the abortion question followed the common law rule that it was not an indictable offense to cause the mis-

98 W. BLACKSTONE, COMMENTARIES *129-30.

99 On this point, a number of cases decided in the mid-nineteenth century, in which a woman or her accomplice was charged with murdering a newborn child, uniformly declared the law to be that a verdict of murder could not be returned unless it was proved that the child was *born alive* since an unborn child could not be the subject of homicide. *Regina v. Trilloe*, 174 Eng. Rep. 674 (N.P. 1842); *Regina v. Wright*, 173 Eng. Rep. 1039 (N.P. 1841); *Regina v. Reeves*, 173 Eng. Rep. 724 (N.P. 1839); *Rex v. Sellis*, 173 Eng. Rep. 370 (N.P. 1837); *Rex v. Crutchley*, 173 Eng. Rep. 355 (N.P. 1836); *Rex v. Bain*, 172 Eng. Rep. 1272 (N.P. 1834); *Rex v. Enoch*, 172 Eng. Rep. 1089 (N.P. 1833); *Rex v. Poulton*, 172 Eng. Rep. 997 (N.P. 1832).

100 CLARK & MARSHALL, A TREATISE ON THE LAW OF CRIMES § 292 at 394 (5th ed. 1952).

101 43 Geo. 3, ch. 58 (1803), cited in Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 431-32 (1961). This excellent work contains a complete history of English and American abortion statutes.

102 Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 432 (1961).

103 *Id.*

104 *State v. McKee*, 1 Add. 1 (Pa. 1797).

carriage of a child that had not yet quickened.¹⁰⁵ Consequently, the states, beginning with Connecticut in 1821, gradually enacted abortion laws providing statutory protection for the unborn child.¹⁰⁶ There has been some disagreement as to the original purpose of these abortion statutes—specifically, whether they were meant to protect the life of the mother or the child.¹⁰⁷ It is obvious that the common law prohibition against abortion (after quickening) was meant to protect the child since, as Blackstone stated, life began in the contemplation of the law when the child was felt to move in his mother's womb. This protection for the child was unquestionably carried over into the early statutes since, under most of those laws, the pregnant woman herself could commit the crime.¹⁰⁸ In 1921, Judge Roscoe Pound, sitting on the New York Court of Appeals, commented:

By the criminal law, such being the solicitude of the state to protect life before birth, it is a great crime to kill the child after it is able to stir in the mother's womb by any injury inflicted upon the person of the mother . . . and it may be murder if the child is born alive and dies of prenatal injuries. . . . If the mother with the intent to produce her own miscarriage produces the death of the quick child whereof she is pregnant, she may be guilty of manslaughter. . . . If the child is not quick, it may be felony to produce a miscarriage.¹⁰⁹

Nevertheless, many writers, relying on the fact that most statutes do not require actual pregnancy for the crime of abortion to be committed, have concluded that the main purpose of the statutes was, and still is, to protect the woman from the dangers of the unskilled abortionist.¹¹⁰ Whatever the purpose may have been, it

105 *Commonwealth v. Bangs*, 9 Mass. 387 (1812); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263 (1845); *State v. Cooper*, 22 N.J.L. 52 (1849); *Smith v. State*, 33 Me. 48 (1851); *Abrams v. Foshee*, 3 Iowa 274 (1856); *Smith v. Gafford*, 31 Ala. 45 (1857).

In *Cooper*, the New Jersey Supreme Court, defining the common law rule, stated: "In contemplation of law, life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life, no matter when it first received it." *State v. Cooper*, 22 N.J.L. 52, 54 (1849).

However, it seems that Pennsylvania did not adhere to the common law rule relating to abortion. In *Mills v. Commonwealth*, 13 Pa. 630 (1850), the court held that an abortion is punishable at common law in that state whether committed before or after the child has become quick. The court stated: "[The offense] is the destruction of gestation. . . . The moment the womb is instinct with embryo life and gestation has begun, the crime may be perpetrated." *Id.* at 632.

106 Quay, *supra* note 102, at 435.

107 See G. WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 153 (1957); Leavy and Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 123, 135 (1962).

108 The English abortion statutes provided that the woman herself could commit the crime of abortion only if she was actually pregnant, while other persons could commit the crime if the necessary intent was present without regard to whether the woman was actually pregnant or not. In each case it was a felony. These statutes, in turn, became the model for the American abortion laws. Quay, *supra* note 102, at 432-35.

It seems evident, therefore, that the abortion statutes were meant to serve the dual purpose of protecting both the life of the child and the mother. See *State v. Howard*, 32 Vt. 380 (1859).

109 *Drobner v. Peters*, 232 N.Y. 220, 222-23, 133 N.E. 567 (1921).

110 See note 107 *supra*. Some courts have strengthened this theory with statements such as the New Jersey Supreme Court's in *State v. Murphy*, 27 N.J.L. 112 (1858): "The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts." *Id.* at 114. But another justice of the New Jersey Supreme Court has specifically disagreed with the purport of this statement and says that the statute was primarily meant to protect the child and the "secondary objective" was to furnish protection for the life and health of the mother. Francis, J., concurring in *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689, 699 (1967).

is certain that these statutes afforded the unborn child a considerable amount of legal protection—and probably actual legal recognition. Until 1967, every state and the District of Columbia had a statute making abortion a crime unless it was necessary to save the life of the mother.¹¹¹ Since then, sixteen states have revised their statutes to allow abortion for a variety of reasons.¹¹² In addition, the District of Columbia and the State of Wisconsin are, to some extent, presently without criminal abortion statutes due to recent court decisions holding these statutes unconstitutional.¹¹³

Many of the new abortion statutes actually go beyond what was allowed by the common law. The common law prohibited abortion after quickening *even by the woman herself*. Every one of the abortion revisions, however, permit abortion after the time which is generally conceded to be the point of quickening (14-20 weeks of the pregnancy¹¹⁴). Eight states¹¹⁵ have provided no time limit at all in their recent abortion revisions (which would suggest that in these states the unborn child is subject to being killed at any moment of existence in the womb). It would hardly be proper to classify this as a legal "reform," as the abortion proponents have generally done. To paraphrase one author on the subject, no utilitarian appeal can hide from the perceptive lawyer the hard fact that the abortion "reforms" are not legal evolution, but revolution.¹¹⁶ The new abortion statute revisions are inconsistent with the reason and logic that was itself the common law. Furthermore, the demise of the criminal abortion statutes will effectively remove the only protection that the law has provided for the unborn child. As was pointed out above, the unborn child could not be the subject of homicide at common law.¹¹⁷ But some statutory protection for the unborn child after quickening has been provided by feticide statutes in several states.¹¹⁸ These statutes make it a separate offense (usually manslaughter) to kill an unborn quick child willfully and under such circumstances that, had the mother rather than the child been killed, the offense would have been murder. Even those writers who

111 The statutes are cited in GEORGE, *Current Abortion Laws: Proposals and Movements for Reform*, in ABORTION AND THE LAW 1 (Smith ed. 1967).

112 See statutes cited in note 3, *supra*.

113 See cases cited in note 2, *supra*.

114 AMERICAN LAW INSTITUTE, MODEL PENAL CODE, § 207.11 (Tentative Draft No. 9, 1959) (comment).

115 Arkansas, Colorado (sixteen-week limit if pregnancy resulted from alleged rape or incest), Georgia, Kansas, New Mexico, North Carolina, South Carolina, and Virginia. In addition, California's new statute says: "In no event shall the termination of pregnancy be approved after the 20th week of pregnancy." CAL. HEALTH & SAFETY CODE § 25953 (West 1969). The statute does not seem to prohibit the performance of an abortion after that time.

116 Louisell, *supra* note 95, at 248.

117 *Supra* notes 99, 104.

118 Arkansas: ARK. STAT. ANN. §§ 41-2223, 41-2224 (1964); Florida: FLA. STAT. ANN. §§ 782.09, 782.10 (1965); Georgia: GA. CODE ANN. §§ 26-1101 to 1104, 26-9921a (1969 Revision); Michigan: MICH. STAT. ANN. §§ 28.554, 28.555 (1954); Mississippi: MISS. CODE ANN. § 2222 (1956); Missouri: MO. ANN. STAT. §§ 559.090, 559.100 (Vernon 1953); Nevada: NEV. REV. STAT. §§ 200.210, 200.220 (1967); New York: N.Y. PENAL CODE § 125.00 (McKinney 1967); North Dakota: N.D. CENT. CODE ANN. §§ 12-2502, 12-2503 (1960); Oklahoma: OKLA. STAT. ANN. tit. 21, §§ 713, 714 (1958).

A feticide statute was also enacted in England in 1929. That act, known as the Infant Life Preservation Act, prohibits the killing of any child which is capable of being born alive and provides a penalty of life imprisonment upon conviction. Furthermore, compliance with the Abortion Act of 1967, which legalizes abortion in certain circumstances in England is no defense where a viable fetus has been destroyed. SMITH AND HOGAN, CRIMINAL LAW 241-42 2d ed. (1969).

favor liberalized abortion have admitted that "conceptually these [feticide] statutes clearly accord independent personality to the fetus, for the killing of the fetus under these circumstances is called manslaughter, and the sections themselves are usually found with the other homicide sections."¹¹⁹

Statutes of this type, it will be noted, do not require the child to be born alive before he is entitled to the protection of the law. Under the feticide statutes, both the quick child and the mother are human beings and to unlawfully kill either constitutes homicide.¹²⁰

Despite these few statutory provisions which make the unborn child the subject of homicide, however, live birth seems to be an absolute requirement to sustain a conviction for homicide by the common law terms. The problem is not only proving live birth but also defining it.¹²¹ Some courts have held that there must be proof that the child had an independent circulation in order to establish live birth;¹²² some have held that the fact the child has breathed is not sufficient in itself to prove live birth;¹²³ others have required proof of both respiration and an independent circulation;¹²⁴ and it is the general rule that the birth must be complete, i.e., the whole body of the child must be expelled from the mother.¹²⁵ There is, however, a difference of opinion as to whether the umbilical cord must have been severed.¹²⁶

In reaction to the vagueness and inconsistency of the law of homicide on this subject, and, perhaps, in reaction to the fact that a child could be killed with impunity when he was only partially expelled from his mother,¹²⁷ a California court in 1947 held that a child in the process of being born is a human being within the meaning of that state's homicide statute.¹²⁸ In fact, the court even suggested that a viable unborn child could be the subject of homicide. The court explained:

There is no sound reason why an infant should not be considered a human being when born or removed from the body of its mother, when it has reached that stage of development where it is capable of living an inde-

¹¹⁹ GEORGE, *supra* note 111, at 11.

¹²⁰ For an example of a recent prosecution under these statutes see *Tiner v. State*, 239 Ark. 819, 394 S.W.2d 608 (1965).

¹²¹ See generally Atkinson, *Life, Birth and Live-Birth*, 20 L. Q. REV. 134 (1904); Annot., 159 A.L.R. 523 (1945).

¹²² *Rex v. Enoch*, 172 Eng. Rep. 1089 (N.P. 1833); *State v. Winthrop*, 43 Iowa 519 (1876).

¹²³ *Rex v. Enoch*, 172 Eng. Rep. 1089 (N.P. 1833). In this case, Justice Parke stated: The child might breathe before it is born; but its having breathed is not sufficiently life to make the killing of the child murder . . . [T]here must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose. *Id.*

See also *Morgan v. State*, 148 Tenn. 417, 256 S.W. 433 (1923); *Shedd v. State*, 178 Ga. 653, 173 S.E. 847 (1934).

¹²⁴ *Jackson v. Commonwealth*, 265 Ky. 295, 96 S.W.2d 1014 (Ct. App. 1936).

¹²⁵ *Cordes v. State*, 54 Tex. Crim. 204, 112 S.W. 943, 947 (1908); *Rex v. Poulton*, 172 Eng. Rep. 997, 998 (N.P. 1832).

¹²⁶ *State v. Winthrop*, 43 Iowa 519 (1876) (yes); *Jackson v. Commonwealth*, 265 Ky. 295, 96 S.W. 1014 (Ct. App. 1936) (no).

¹²⁷ One such case is *Wallace v. State*, 7 Tex. Ct. App. R. 570 (1880), where the court held that the jury should acquit if they found that the woman had killed her child by tying a string around its throat before the child was completely born. There was no crime unless the strangulation occurred after complete birth.

¹²⁸ *People v. Chavez*, 77 Cal. App. 2d 621, 176 P.2d 92 (Dist. Ct. App. 1947).

pendent life as a separate being, and where in the natural cause of events it will so live if given normal and reasonable care. It should equally be held that a viable child in the process of being born is a human being within the meaning of the homicide statutes, whether or not the process has been fully completed.¹²⁹

Clearly, this is a more rational approach to the problem of independent life, and a few courts who were troubled by the live-birth rule were quick to follow.¹³⁰

Nevertheless, this decision has had almost no effect on the live-birth rule, even in the state of California itself, as is shown by the recent California Supreme Court decision in *Keeler v. Superior Court*.¹³¹ In this case, the defendant was indicted for the murder of a viable unborn child. The facts of the case are worth mentioning. The defendant met his former wife on a narrow mountain road near a home where she had been living with another man in a non-marital relationship. She was, at the time, approximately eight months pregnant by this other man. The defendant forced her car to the side of the road with his car, shouting: "I hear you are pregnant!" He opened the door of her car and pulled her out by her arm. He then looked at her abdomen and said: "You sure are. I'm going to stomp it out of you!" He then pushed her against the car and kicked his knee into her abdomen. When the woman entered the hospital, a Caesarian section was performed and the child was found to be dead as a result of a fractured skull.¹³² Expert medical testimony indicated that the baby girl "had reached the 35th week of development, had a 96 percent chance of survival, and was 'definitely' alive and viable at the time of death. . . ."¹³³ The California District Court of Appeals unanimously upheld the indictment stating that a viable unborn child is a human being for the purpose of California's homicide statute.¹³⁴ The Supreme Court of California, however, dismissed the indictment, reasoning that to hold the defendant liable for murder in light of the vast precedent adhering to the live-birth rule would be tantamount to creating an *ex post facto* law. The court refused to admit that the defendant could have anticipated from the *Chavez*¹³⁵ case that his actions would constitute murder. Two justices, Burke and Sullivan, dissented on the theory that common sense and the *Chavez* case should not be disregarded.

The irony of the *Keeler* decision is that, had the defendant's assault on the unborn child been somewhat less severe or even less accurate so that the child was born alive before she died from the injuries, the crime would clearly have been

129 *Id.* at 626, 176 P.2d at 94.

130 *E.g.*, *Singleton v. State*, 33 Ala. 536, 35 So.2d 375 (Ct. App. 1948).

On the other hand, some courts went out of their way to acquit the defendant. One such case is *People v. Hayner*, 300 N.Y. 171, 90 N.E.2d 23 (1949). In this case, the defendant admitted assisting in the birth of a child and also strangled the child with the umbilical cord when the baby started to cry just as it was being born. The defendant further confessed to decapitating the baby and then secretly disposing of the remains. The New York Court of Appeals reversed the murder conviction on the grounds that there was not sufficient proof that the child was both alive and wholly expelled from its mother's body when the strangulation occurred. The court attached no significance to the defendant's confessions.

131 87 Cal. Rptr. 481, 470 P.2d 617 (1970).

132 *Id.* at 482, 470 P.2d at 618.

133 *Id.* at 494, 470 P.2d at 630 (dissenting opinion of Acting Chief Justice Burke).

134 *Keeler v. Superior Court*, 276 Cal. App. 324, 80 Cal. Rptr. 865 (1969).

135 *People v. Chavez*, 77 Cal. App. 2d 621, 176 P.2d 92 (Dist. Ct. App. 1947).

murder.¹³⁶ It is therefore to the defendant's advantage to be sure that he has killed, rather than merely injured, the child *in utero*. One would have to search long and hard to find a better example of inverse justice at work. The *Keeler* case will stand, at least, to refute the statement made in 1969 by retired United States Supreme Court Justice Tom Clark that "[n]o prosecutor has ever returned a murder indictment charging the taking of the life of the fetus."¹³⁷ Indeed, not only has a prosecutor returned the indictment, but a unanimous appeals court has sustained it and two justices of a state supreme court have dissented against dismissal of the indictment. It seems incredible that the life of a viable child in the eighth month of pregnancy can be intentionally and maliciously destroyed without any criminal redress on behalf of the dead child.

California was not the only state to recently consider the question whether an unborn child can be the subject of homicide. In 1969, an Ohio court found a defendant guilty of vehicular homicide in the death of a baby girl who was stillborn during the seventh month of pregnancy as a result of an automobile accident caused by the defendant's intoxicated condition.¹³⁸ The court held that the use of the word "person" in the state's vehicular homicide statute meant a living individual, and concluded that a seven-month, viable unborn child was certainly such a person.¹³⁹ The Ohio Court of Appeals, however, in a 2 to 1 decision recently reversed this conviction and released the defendant from all criminal liability toward the dead child.¹⁴⁰ The court, citing the *Keeler* case, held that the word "person" in the homicide statute was to be given its common law meaning, and since the unborn child could not be the subject of homicide at common law, there could be no criminal liability under the present homicide statute in the absence of express legislative intent.

The primary difficulty with both decisions is that they are illogical to the extent that a viable, unborn child of seven or eight months is a human being that is capable of living outside the mother's body, yet such a human being is not entitled to the law's protection. It seems odd that an unborn child is considered to be a "person" for the purpose of tort liability if he is killed by a negligent driver, but is not considered to be a person for purposes of criminal liability. Ohio, for example, has determined that the unborn child can own and inherit property, recover in tort for personal injuries and be the subject of a wrongful death action even if he is born dead, yet Ohio does not extend the protection of the homicide laws to the unborn child. It again appears that the law rewards the defendant for killing the unborn child rather than merely injuring him. Unlike the law of torts, the criminal law of homicide seems to be still adhering to the common law misconception that the unborn child is part of his mother. Such an attitude does

¹³⁶ It is not necessary that the injury which causes death be inflicted after the child is born. If the injuries were inflicted upon the child prior to birth, and the child is born alive but subsequently dies due to the prior injuries, this is sufficient to establish homicide. *Morgan v. State*, 148 Tenn. 417, 256 S.W. 433 (1923); *Clarke v. State*, 117 Ala. 1, 23 So. 671 (1898).

¹³⁷ Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA U. L.A. L. REV. 1, 10 (1969).

¹³⁸ *State v. Dickinson*, 47 Ohio Op. 2d 373, 248 N.E.2d 458 (1969).

¹³⁹ *Id.* at 376, 248 N.E.2d at 461.

¹⁴⁰ *State v. Dickinson*, 23 Ohio App. 2d 259 (1970).

not speak very highly of twentieth-century criminal justice. As was said in *Bonbrest*: "The law is presumed to keep pace with the sciences."¹⁴¹

III. Abortion, the Law, and the Unborn Child: The Inconsistencies of It All

The law relating to the unborn child was in its final evolutionary stages when the recent abortion statute revisions struck their revolutionary blows. By the mid-1960's, there were few disagreements in this area of the law, but the reversal of trends by the introduction of the new liberalized abortion statutes has brought unprecedented inconsistencies to the law. To mention all these inconsistencies would be a monumental task, but a few examples will be sufficient to present the problem.

The unborn child, under the law of property in most jurisdictions, can, among other things, inherit and own an estate,¹⁴² be a tenant-in-common with his own mother,¹⁴³ and be an actual income recipient prior to birth.¹⁴⁴ The new liberalized abortion laws, however, present a dilemma in this area. Is it a crime for a woman to misappropriate the estate of her unborn child, and yet no crime for her to kill that child? Can a woman, who has inherited an estate as a tenant-in-common with her unborn child, increase her own estate 100 percent simply by killing the child? Will the law which has recognized the unborn child as an actual income recipient prior to birth allow the child's heir (the mother) to kill the child for her own financial gain? Will the law that has specifically said that an unborn child's *estate* cannot be destroyed where the child has not been represented before the court¹⁴⁵ allow the child himself to be destroyed without being represented before the court? These few possibilities are but a sample of the legal maze that the abortion law revisions have created.

The law of torts provides even more striking examples. Will the pregnant woman who is hit by a negligent driver while she is on her way to the hospital to have an abortion still have a cause of action for the wrongful death of her unborn child? If so, how is it possible for the law to say that a child can be wrongfully killed only hours before he can be rightfully killed? Absurd as it may seem, this is the present state of the law in some jurisdictions, and it does no good to say that the inconsistencies can be abated simply by refusing all recovery for prenatal injury or death because negligent death or injury to a child whose mother does not want an abortion clearly is a recognizable wrong for which there must be just compensation.

Is the unborn child any less a person when, instead of being killed by an automobile, he is killed by a doctor in the performance of an abortion?¹⁴⁶ Seldom has the law been confronted by such an obvious contradiction.

141 See note 55 *supra*.

142 *Hall v. Hancock*, 32 Mass. (15 Pick.) 255 (1834).

143 *Biggs v. McCarty*, 86 Ind. 352 (1882).

144 *Industrial Trust Co. v. Wilson*, 61 R.I. 169, 200 A. 467 (1938).

145 *Deal v. Sexton*, 144 N.C. 157, 56 S.E. 691 (1907).

146 In fact, an Ohio court has held that an unborn child in the twenty-fourth week of gestation is a "person" within the meaning of a family compensation clause of an automobile liability insurance policy. *Peterson v. Nationwide Mut. Ins. Co.*, 26 Ohio Op. 2d 246, 197 N.E.2d 194 (1964). Is it possible for a human life to be both legally insurable and legally destructible at the same moment in time?

The criminal law also has given rise to legal inconsistencies as a result of the new abortion laws. The drafters of the Model Penal Code were obviously searching for a criminal law compromise when they included the section on abortion in the Code.¹⁴⁷ The Code attempted to draw a distinction between abortions which occur late in pregnancy and those which

occur prior to the fourth month of pregnancy, before the fetus becomes firmly implanted in the womb, before it develops many of the characteristic and recognizable features of humanity, and well before it is capable of those movements which when felt by the mother are called "quickening." There seems to be an obvious difference between terminating the development of such an inchoate being, whose chance of maturing is still somewhat problematical, and, on the other hand, destroying a fully formed viable fetus of eight months, where the offense might well become ordinary murder if the child should happen to survive for a moment after it has been expelled from the body of the mother.¹⁴⁸

Abortion, even on these terms, would be logically and legally inconsistent. But some of the states which have recently legalized abortion have gone beyond the Code's provisions. Eight¹⁴⁹ of the new liberalized abortion statutes provide no time limit after which abortions may not be performed. Likewise, abortions at any moment of pregnancy can now be performed in military hospitals without regard to local state laws.¹⁵⁰ "A fully formed viable fetus of eight months," to use the Code's language, "where the offense might well become ordinary murder if the child should happen to survive for a moment after it has been expelled from the body of the mother," can now be legally killed in the name of abortion. In effect, as recent reports from Sweden have indicated¹⁵¹ these new abortion statutes have succeeded in legalizing what the criminal law has always regarded as murder.

Another source of inconsistency for the criminal law is the confrontation between the feticide statutes that exist in some ten states¹⁵² and the new abortion statutes. The feticide statutes make it a separate offense of homicide to kill an unborn child after quickening by an assault upon the child's mother. These statutes, therefore, clearly recognize the unborn, quick child as a human being entitled to the law's protection. How, then, is it possible for the law to say that a child can be legally killed by abortion when it would be homicide to kill the child under different circumstances? Some states (other than the ten that still have feticide statutes) have recognized this inconsistency and, instead of confronting

147 AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962).

148 AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 207.11 (Tentative Draft No. 9, 1959) (comment).

149 See note 115 *supra*.

150 Letter from Brigadier General George J. Hayes to Senator Vance Hartke, September 9, 1970, on file with the *Notre Dame Lawyer*.

151 Generally, after the second or third month of pregnancy the child must be aborted via a Caesarian section or induced labor. Unlike other methods of abortion where the child is scraped from the womb of the mother in bits and pieces, see Byrn, *Abortion on Demand: Whose Morality?* 46 NOTRE DAME LAW. 5 (1970), by Caesarian section the child is lifted from the mother in one piece and then disposed of. Reports from Sweden indicate that some abortions are performed as late as the sixth month. As a result, very often the child will kick and cry for hours before he finally dies. TIME, Oct. 13, 1967, at 32-33.

152 See note 118 *supra*.

abortion for what it really is—a legal absurdity—they have repealed their feticide statutes, which in some cases had existed for over one hundred years.¹⁵³

No doubt the law could correct these inconsistencies simply by redefining the terms "homicide" or "human being." If legalized abortion is within the law's power to grant, then there is no reason why the law cannot just decide who will live and who will die. Indeed, both modern medicine and the law have agreed that death is to be defined by the absence of any brain activity as evidenced by a flat electroencephalogram (EEG).¹⁵⁴ The brain of an unborn child has been found to produce an EEG reading as early as the seventh month of gestation.¹⁵⁵ If life, therefore, is to be evidenced by the presence of an EEG reading, then the unborn child is legally alive, and to kill him—whether it be called abortion, therapeutic abortion or eugenic abortion—is murder by the law's very own terms. Certainly there are due process and equal protection problems if some people who are "legally" alive are entitled to the law's protection while others are not.

There is no such thing as a constitutional right to kill another human being as some courts have seemed to suggest.¹⁵⁶ It might be possible for a court to say that a woman has a constitutional right to choose whether or not to become pregnant, as the Supreme Court did in *Griswold v. Connecticut*,¹⁵⁷ but for any court to interpret this to mean that a woman may destroy a life after it has begun is legal nonsense. The unborn child is not a part of the mother. The organs and the blood of the child are his own, and at six weeks the features of his face—a human face—are discernible.¹⁵⁸ Even the belief that the placenta was part of the mother has been proven to be false.¹⁵⁹ The child is "neither a quiescent vegetable nor a witless tadpole, as some have conceived him to be in the past, but rather a tiny human being, independent as though he were lying in a crib with a blanket wrapped around him instead of his mother."¹⁶⁰ "The fertilized egg . . . grows and develops into an embryo, a fetus, an infant, a youngster, an adolescent, an adult, an oldster, and, finally a cadaver."¹⁶¹ "Birth is not a beginning. . . . It is more nearly a bridge between two stages of life."¹⁶² It is as irrational to choose birth, quickening, or viability as the point at which life is to be legally protected as it is to choose the age of six months, seven years, or the age of adult majority as the Roman law essentially did.¹⁶³

Griswold v. Connecticut stands for the principle that there is a constitutional right to marital privacy. With all due respect for the judges that decided *Babbitz*

153 *E.g.*, KAN. GEN. STAT. ANN. § 21-409, repealed and superseded by KANSAS LAWS 1969 ch. 180.

154 Biorck, *When Is Death?* 1968 WIS. L. REV. 484.

155 GUTTMACHER, *The Legal Status of Therapeutic Abortions*, in ABORTION IN AMERICA 177n (Rosen ed. 1967).

156 In *Babbitz v. McCann*, 310 F. Supp. 293 (E.D. Wis. 1970), the court held that a woman had a constitutional right to abort a child that had not yet quickened.

157 381 U.S. 479 (1965).

158 H. LILEY, MODERN MOTHERHOOD 28 (1967).

159 *Id.* at 24.

160 *Id.* at 26-27.

161 B. WALLACE AND T. DOLZHANSKY, RADIATION, GENES AND MAN 19-20 (1959), quoted in Kindregan, *Abortion, The Law, and Defective Children: A Legal-Medical Study*, 3 SUFF. L. REV. 225, 257 (1969).

162 MONTAGU, LIFE BEFORE BIRTH 205 (1964).

163 J. NOONAN, CONTRACEPTION 113 (1965). Professor Noonan states that it was not made a crime for a father to kill a son or daughter until November 16, 318 A.D.

v. McCann,¹⁶⁴ abortion has absolutely nothing to do with marital privacy. The court in *Babitz* has made one very big mistake—it has equated the prevention of life with the destruction of life.

IV. Conclusion

Social and economic pressures are probably the main impetus for the liberalized abortion statutes; surely there is no legal precedent. While social and economic problems should not be disregarded by the law in its decision-making process, they should not be the sole considerations; they should not be allowed to blind the law of its true purpose—justice. The laws that a people make for themselves somehow stand out as a mirror of their social and personal values. Laws are the personality of a people.

The questions that have been asked in this note and the inconsistencies that have been enumerated serve to point up the downright absurdity of legalized abortion in the Anglo-American law. A recent British experience is but an example:

Early in 1969, an unmarried student was aborted in a Scottish hospital. The certifying doctors ringed the clauses on the certificate which concern "greater risk to the mental and physical health of the pregnant woman . . ." and "substantial risk of abnormality." In fact the fetus was more than twenty-eight weeks old and after the abortion lived for nine hours, being discovered to be alive when the porter carrying it to an incinerator in a paper bag heard its cries.¹⁶⁵

Everyone is aware that this is the age of "women's freedom." "But at this point the evolution favoring freedom for women encounters the evolution favoring the recognition of the fetus as a living person within the womb—an evolution supported by the data of biology and the precedents of property, tort, constitutional, and welfare law."¹⁶⁶ Upon what basis, therefore, can abortion be legally justified?

William J. Maledon

¹⁶⁴ See note 156 *supra*.

¹⁶⁵ FINNIS, *Three Schemes of Regulation*, in *THE MORALITY OF ABORTION* 213-14 (J. Noonan ed. 1970). It is interesting to note in this particular case no attempt was made to keep the child alive, as various medical witnesses later testified, since the object of abortion is to prevent the child's survival. *Id.* at 214.

¹⁶⁶ Noonan, *The Constitutionality of the Regulation of Abortion*, 21 *HAST. L. J.* 51, 65 (1969).