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Abortion: Part XI: (A Legal Review Continued)

Paul V. Harrington

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Rt. Rev. Msgr. Paul V. Harrington, P.A., J.C.L.

In the previous article, we investigated the rights of the unborn child in civil law to sue for pre-natal injuries and under the wrongful death statutes. We shall continue in this article the consideration of the fetus and *its status* in the civil law.

2. The Right of the Fetus to Receive Support

Kindregan refers to State Statutes and two cases to demonstrate that the fetus has the right to receive support and that the state can vindicate and enforce it.[1]

The Penal Code of California requires a father to support all minor children and an unborn child is included within this requirement.[2] In 1933, a California Court indicated that there was a crime involved in the non-support of an unborn child and the defendant could be so charged.[3]

A second California decision *Kyne v. Kyne* – in 1940 – ruled that a suit could be brought before the court on behalf of an unborn child in order to have paternity legally determined and in order to insure his proper support.[4]

An action was instituted juvenile Court in Colorado on be lf of an unborn child, claiming tha he fetus was a dependent child und the state statute concerned with su ort. The Supreme Court of the Sta ssued an order which required the d ndant to set aside thirty per cent o his salary for the support of his un rn child. The decision relates that violence is done to the orderly pr ss of the rational mind by letting the ord *child* include a human being mediately upon conception."[5]

3. The Rights of a Fetus to Inherit

Provided a fetus is subsequently born alive, he has always enjoyed from the common law the righ to inherit. "The law of inheritance adopts the view that if one dies intestate, his unborn child, if born alive, inherits equally with its older brothers and sisters."[6] Atkinson states "An intestate's posthumous child is considered in being and will inherit just as if he had been born in the intestate's lifetime. . . . This was the common law rule with respect to both realty and personalty . . . a posthumous child may recover his share of the father's land from a bona fide purchaser obtaining title through a judicial partition sale."[7]

A Massachusetts decision in 1834 declared that a bequest to children or grandchildren in existence at the time of a testator's death would include a posthumous child or grandchild who was *en ventre sa mere* at that time.[8]

A will contested in New York in 1927 reached an identical conclusion. According to the legal instrument, a trust fund was to be established from the residue of the testatrix' estate and this was to be divided "into as many equal parts as I may have grandchildren living at the time of my decease." It was ascertained by the court that a female grandchild had been conceived *three weeks* before the death of the testatrix and was, therefore, in being, existing and having life at the time of her demise. The decision made finding that she "was and is a living child for all purposes pertaining to her property rights."[9] This is about as close to the moment of conception as one could hope to get. This further indicates that the law considers fetal life to be human and the fetus as a person from the very moment of conception.

The law, thus, recognizes the existence, the life, and the person of the fetus and his right, during prenatal gestation, to benefit from intestate succession, from a will or a trust and accords the exercise of this right after the fetus has been born.

4. The Rights of a Fetus under Workmen's Compensation Act

A 1943 case in the United States reached exactly the same conclusion as a 1907 case before the English Courts (cf. supra, *Williams v. Ocean Coal Co., Ltd.*, footnote #6): the conclusion being that a child conceived before but born only after the father's death is to be considered as in existence at the time of the demise and, thus, to be the recipient and beneficiary of any and all benefits, under Workmen's Compensation statutes, to which existing children are entitled.[10]

5. The Right of a Fetus to Sue before birth through a legally appointed Guardian

This caption includes two closely interrelated rights – the right to have a guardian legally appointed for a fetus and the right of the fetus to bring an action before the Courts, using the services of the legally appointed guardian – and, therefore, they will be considered together.

In 1940, an expectant mother, who was a minor, petitioned for the appointment of a guardian ad litem for her yet unborn child. The guardian was appointed and she in turn, brought an action, in advance of birth and on behalf of the fetus, before the California Courts for the determination of paternity and for the assurance of support. The defendant argued against the right of an unborn child to sue but the Court recognized this right to sue when the litigation sought a determination of paternity and the enforcement of support.[11]

New Jersey had two cases in its courts in the 1960's – which referred to the appointment of guardians and to blood transfusions.

(Monsignor Harrington is Vice-Officialis for the Archdiocese of Boston.)

In 1961, guardianship over an unborn child was given to a county department of welfare to ensure that the child, when born, could and would receive blood transfusions, that were essential and necessary for his continued good health.[12]

The second case came before the New Jersey Supreme Court in 1964. In this particular case, the expectant mother, because of religious reasons and objections of conscience, would not allow blood transfusions. The Court ordered the appointment of a special guardian for the protection of his health.[13]

In each of these cases, the courts clearly recognized that the fetus had rights – thus indicating that the fetus is a person – and that these rights could only be safeguarded by the appointment of a guardian who, in the absence of the unborn child, would seek his welfare and best interests.

6. The Right of a Fetus to Birth and to Life

Under this caption, we shall consider what right a fetus possesses to be born and to live and what recognition the law and the courts have given to this right.

The English common law, acknowledging the right of a fetus to be born, would not allow the execution of a pregnant woman, who was charged and found guilty of a capital offense, which was punishable by death.

In former times, the law required that the defendant be "quick with child" before it would stay the execution. The reason for insisting on the "quick" rule, was the fact that this was the only real test of pregnancy that medical science had developed in that period. A devious, conspiring and intriguing woman could use a pregnancy as the reason or excuse to delay an execution and no one could prove or disprove whether or not she was pregnant.

In specific instances, the English Courts would actually impanel a jury of matrons, whose responsibility under their oath, was to examine the defendant and report back to the court whether the woman was pregnant by reason of having found her "quick" with child.

As medical science presented valid tests of pregnancy that would indicate the presence or absence of such a state long before "quickening", the law abandoned the "quick" rule and now pregnancy in any stage is a reason to seek and be granted a stay of execution. Also, the impaneling of a jury of matrons has disappeared and the examination of a competent doctor will suffice. Finally, the execution is not only stayed but set aside completely and the defendant is sentenced to penal servitude for life.[14]

Barry notes: "When the plea was successful, the reprieve was granted, not out of consideration of the woman, but *in favorem prolis*" (in favor of the offspring).[15] What this statement says is that the reprieve was not granted for a sentimental or emotional reason just because the woman was pregnant but it was given because the law recognizes that a fetus has the right to be born and to live and execution of the mother would deprive the fetus of this basic right. This was clearly set forth in a 1949 decision in *State v. Cooper.*[16]

It might be interjected at this time that the original laws, declaring abortion to be a crime, were passed precisely because the State recognized the right of a fetus to be born and to live and realized that such a right is extinguished by each abortion.

The fact that a fetus has a right to be born and thereby has a right to all therapeutic measures necessary to insure his prenatal health and his live birth and the fact that the law and the courts recognized these rights is evident in two very important decisions with reference to blood transfusions.

In 1961, a case was presented to the New Jersey Court. The facts were simple: a woman was in the advanced stages of pregnancy, which was complicated by erythroblastosis fetalis – a blood incompatibility between mother and child. If the child were to survive and to grow into a healthy youngster and develop normally, he would require transfusions of blood after birth to replace the diseased blood he was carrying. In advance of birth, the mother indicated that, because of religious beliefs, she could not authorize and she would not allow the blood transfusions.

A petition was presented to the court on behalf of the unborn child, clearly indicating that his very life and health was at stake unless the transfusions were allowed. The court recognized these rights of the fetus to life and good health and realized that the State had a responsibility and obligation to enforce these rights.

In its decision in the *Hoener v. Bertinato* case, the Court considered the fetus to be a minor child in the meaning of the statute which allows the court to take a child from the custody of parents, when his best interests are not being protected. In so ruling, the Court relied on its civil paternal jurisdiction, which imposes a responsibility on the government to protect the rights of its citizens, particularly citizens who are not in a position to care for themselves.

The court entrusted the unborn child to a county welfare department and authorized this body to provide any and all care that the infant would require to sustain his life and to assure sound health. The decision clearly indicated that the "fetus was before the court." It need not be pointed out that only persons come before the courts. In passing, the court noted: *"It is now settled that an unborn child's right to life and health is entitled to legal protection, even if it is not viable."*[17] (emphasis supplied)

The second case was different in regard to the facts and more complicated with reference to the legal implications. It was decided by the Supreme Court of New Jersey. The expectant mother was in the thirty-second week of her pregnancy and was a patient in the hospital. She required blood transfusions but would not give permission. Without the transfusions, the health and the life of the unborn child were in jeopardy. The hospital, wherein she was a patient, sought the permission of the court to administer blood against the conscientious objections of the patient. The court faced a serious dilemma: on the one hand, the court would wish to protect the life and health of the unborn child; on the other hand, the court would not wish to achieve this objective by compelling a mature adult to act involuntarily and particularly when this would involve a

violation of conscience. In the same year, 1964, Georgetown University Hospital had petitioned the courts for authorization to transfuse a non-pregnant adult against the wishes and the religious objections of the patient and the court refused to grant permission even though it was demonstrated that transfusions of healthy blood were necessary to maintain life and health.[18]

In considering the conflict of rights the right of the fetus to life and birth and the right of the adult for self-determination and for the respectful following of religious beliefs and principles of conscience – the court concluded that the right of the fetus to be born and to live was the more important and must prevail:

"We are satisfied that the unborn child is entitled to the law's protection and that the appropriate order should be made to insure blood transfusions in the event that they are needed."[19]

This decision was appealed but review was denied.[20]

As mentioned previously (cf. supra), the Court also provided for the appointment of a legal guardian for the fetus, who was empowered to seek any and all therapeutic assistance to guarantee the safe delivery of the child.

Because of the conflict of rights and particularly because of the determination of what right prevailed, this case, in a very special way, points up how basic and important is the right of a fetus to be born and how seriously the courts and the State recognize their responsibility to protect and safeguard this right.

In the light of this decis on, it would seem quite contradicto y and inconsistent for the State to li eralize its abortion laws or to egalize abortion, whereby the right of the fetus to be born would ot be recognized or protected and hereby the very life of the fetus w uld be annihilated and extinguished.

7. The Right of the Fetu Not to Be Born

Having just established the ght of a fetus to be born and the resp sibility of the State and the courts t protect this right, it seems contrac tory to talk in terms of a fetus' right ot to be born. Two cases have rece y been introduced with reference to e social condition of the fetus at rth and have, at their very core, the bligation of a child to be born illegi ate and the right of a child to sue f damages because of an illegitimate sta s.

A third case concerns the bligation of a child to be born w serious physical defects.

The first case was brou t before the courts of Illinois in 1 3. A son sued his father for damage by reason of having been born illegiti ate and as the result of an adulterous nion. The Court, in its decision, refe ed to this situation as the tort of "wrongful life". The injury to the c ld did not occur during pregnancy but actually was simultaneous with his very conception.

This type of compla t differed from previous actions in that the injury was not a physical injury but an injury of reputation and status in life. Thus, not being concrete or tangible, there would be difficulty in assessing damages or in arranging compensation, if, in fact, it were found that compensable injury and damage existed. *The simultaneity of the injury with conception was an innovation.*

In a lengthy opinion, in which the Court discussed the social and economic implications of illegitimate birth and admitted that the injury was "continuous and irreparable", the petition was denied because it was concluded that, since this was an extension of the existing concept of prenatal injury, the legislature should determine if illegitimate birth was an injury for which there should be compensation.

Important for our consideration are the remarks of the Court with reference to the right to life of a fetus:

"The case at bar seems to be the natural result of the present course of the law permitting actions for physical injury ever closer to the moment of conception. In point of time it goes just a little further. The significance of this course to us is this: if recovery is to be permitted an infant injured one month after conception, why not if injured one week after, one minute after *or at the moment of conception*? It is inevitable that the date will be further retrogressed. How can the law distinguish the day to day development of life? If there is human life, proved by the subsequent birth, then *that human life has the same rights at the time of conception as it has at any time thereafter*. (emphasis supplied) There cannot be absolutes in the minute to minute progress of life from sperm and ovum to cell, to embryo to fetus, to child."[21]

This excerpt clearly indicates that as far as life and the right to life is concerned, there is no logical or reasonable basis for any distinction such as viability or non-viability. The life, which is conceived with the joining of the sperm and the ovum to form the zygote is the same life which is growing through each of the stages of pregnancy and it is the same life which is ultimately born and which develops into the infant, the child, the adolescence and the mature adult.

The second case was brought initially before the New York State Court of Claims in 1965. The action was brought on behalf of a female child, born in December, 1962, by her grandfather. He alleged that his daughter – the mother of the child –, an unmarried girl, while a patient at Manhattan State Hospital in New York City, was raped by another inmate and as a result, she became pregnant and the child was born illegitimate. The suit further alleges that the rape occurred because of improper supervision, thus making the hospital and the State liable, and that the grandfather requested state authorities to perform an abortion and their refusal brought about the illegitimate birth, for which injury compensation is sought from the State of New York.

The decision by the Court of Claims was rendered by Justice Sidney Squire on June 25, 1965. He concluded that such an action could be brought and there could be recovery for damages sustained by having been born with the social stigma of illegitimacy if it could be legally established that the pregnancy resulted from a rape which occurred because of improper supervision of the patients by the hospital. The decision noted that rape would be a "foreseeable" result by the hospital authorities of improper supervision.

Judge Squire indicated that he did not approve the classification of the case as "a cause of action for wrongful life" and stated that any expectation of subsequent actions for birth with

congenital defects would be "unrealistic, illogical and unsupportable" and without relation to the findings in the present case.[22]

The attorney for the child, Norman Roy Grutman, contended that the action was for an "injury" of not having been put to death by abortion. The New York Times quotes him as saying that "it was this failure to abort and therefore to mitigate damages that lies at the heart of the case."[23]

Kindregan notes that "the advocates of Eugenic Abortion felt that this case introduced the idea of 'wrongful birth' into Anglo-American law – a theory which would require the law to permit 'abortion whenever the child would enter the world under adverse circumstances, e.g., as a mental or physical defective'."[24]

The decision of Justice Squire was reversed by the Appellate Division of the State Supreme Court, which held that there "is no reasonable basis, consistent with public policy, for recognition of a cause of action predicated, first, upon a supposed objection on the part of the State to a person to be conceived and, second, upon allegations of damages not susceptible of ascertainment."[25] The Appellate Judge reasoned that it would be impossible to compute the damages because such computation of compensation would involve a comparison of injury against the "void of non-existence".[26]

As stated above, the third case concerns a child who was born with physical defects. The facts of the case are simple: Sandra Gleitman was examined by Doctor Robert Cosgrove, Jr. on April 20, 1959. At that time, the doctor found her two months pregnant. She informed the doctor that, about March 20, 1959, she had had an illness, which he been diagnosed as German Measles. During the next three months, the pa nt was seen by a doctor at Fort Gordon, Georgia, where her husb d was stationed. In July of 1959, he was seen by Doctor Jerome I an, an associate of Doctor Cosgr e, and made monthly visits until he was delivered of a male child at Margaret Hague Maternity Center, Jersey City, on November 25, 19 . A few weeks after birth, it becam pparent that the child, Jeffrey, had efects in vision, hearing and speech. has had several operations which ve given him some visual capacity d he has attended a special c rectional institute for children with sion and hearing defects. His condi n, which is described by the court a seriously impaired" is not in co ntion or dispute in the case.[27]

There were three se ate and distinct suits entered: the st was an action on behalf of Jeffre Gleitman, the infant, for his birth efects; the second was a suit by Sandr Gleitman, the mother, for the effe s on her emotional state caused b her son's condition; and the third w an action entered by Irwin Gleitman the father, for recovery of damages based upon the costs incurred in the caring of his son.

The trial court dismiss d, without sending to the jury, the pe ition of the child, when the evidence bearing on his complaint, had been completed and the actions of the mother and father when all the evidence had been presented. The Appellate Division, without entertaining argument and on its own motion, sent the case to the Supreme Court in the State of New Jersey.

The Supreme Court on March 6, 1967 affirmed the dismissal of the petitions by the trial court. Four of the seven judges voted for the affirmation and the remaining three voted for reversal. There were four opinions rendered: a majority opinion by the four justices; a concurring opinion by one of the four justices; a dissenting opinion, which was signed by two of the justices and a partially dissenting opinion by the Chief Justice. Thus, only two of the seven judges were in complete disagreement with the majority view.

Sandra Gleitman, in her petition, alleged that Doctor Cosgrove, when informed about the attack of German measles, assured her that this would have no effect at all on her child. Doctor Cosgrove, in his testimony, denied this allegation and stated that, in the presence of another doctor and the patient's mother, he had advised her that there was a twenty per cent chance that the child could be born with a defect. He added that, while some doctors might recommend an abortion, he would not because he did not consider it wise to destroy four healthy babies merely because the fifth might be born with a defect.

Doctor Dolan stated that the patient had never questioned him about the effects of German measles on her child and he did not discuss the matter with her. In addition, he pointed out that when he saw her, she was in her fifth month of pregnancy and a medically safe abortion could not be performed at that time.

"The theory of plaintiff's suit is that defendants negligently failed to inform Mrs. Gleitman, their patient, of the effects which German measles might have upon the infant then in gestation. Had the mother been so informed, plaintiffs assert, she might have obtained other medical advice with the view to the obtaining of an abortion. Plaintiffs do not assert that Mrs. Gleitman's life or health was in jeopardy during the term of her pregnancy."[28]

The trial court, as previously noted, dismissed all complaints without submitting any of them to the jury: the complaint of the infant was dismissed because there was no evidence that the acts of the defendants were in any way the proximate cause of his condition; the actions of the parents were dismissed because the trial judge believed the suggested abortion would be criminal in accordance with the statutes of New Jersey.

The Supreme Court of New Jersey, in the instant case, referred to the right of an infant in New Jersey to sue for prenatal injuries as set forth in a previous decision of the same Tribunal (*Smith v. Brennan*, 31 N. J. 353, 157 A 2d 497 (1960)) and quoted from this decision:

> "The semantic argument whether an unborn child is 'a person in being' seems to us to be beside the point. There is no question that conception sets in motion biological processes which if undisturbed will produce what everyone will concede to be a person in being."[29]

The majority opinion continues:

> "The infant plaintiff is therefore required to say not that he should have been born without defects but that he should not have been born at all . . . he claims that the conduct of defendants prevented his mother from obtaining an abortion which would have terminated his existence, and that his very life is 'wrongful'."[30]

With reference to compensatory damages, the court stated:

"Damages are measured by comparing the condition plaintiff would have been in, had the defendants not been negligent, with the plaintiff's impaired condition as a result of the negligence. The infant plaintiff would have us measure the difference between life with defects against the utter void of nonexistence, but it is impossible to make such a determination. This court cannot weigh the value of life with impairments against the nonexistence of life itself."[31]

As to the damages, sustained by the parents, Judge Proctor, writing the majority opinion, noted:

"Denial of the claim for damages by adult plaintiffs is also required by a close look at exactly what it is they are here seeking. The thrust of their complaint is that they were denied the opportunity to terminate the life of their child while he was an embryo . . . substantial policy reasons prevent the court from allowing tort damages for the denial of the opportunity to take an embryonic life."

"It is basic to the human condition to seek life and hold on to it however heavily burdened. (emphasis supplied) 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."[32]

Referring to the right to life and to the worthwhileness of life, the majority opinion very forthrightly observed:

"The right to life is inalienable in our society. A court cannot say what defects should prevent an embryo from being allowed life such that the denial of the opportunity to terminate the existence of a defective child in embryo can support a cause for action. Examples of famous persons who have had great achievement despite physical defects come readily to mind, and many of us can think of examples close to home. A child need not be perfect to have a worthwhile life."

"We are not faced here with the ne ssity of balancing the mother's life agains that of her child. The sanctity of the sing human life is the decisive factor in this su in tort. Eugenic considerations are not co trolling. We are not talking here about the reeding of prize cattle. It may have been asier for the mother and less expensive for e father to have terminated the life of ir child while he was an embryo, but *th alleged detriments cannot stand ag st the preciousness of the single hum life to support a remedy in tort.*"[33] mphasis supplied)

The court concluded its de sion by remarking:

"Though we sympathize ith the unfortunate situation in which th parents find themselves, we firmly belie the right of their child to live is greate han and precludes their right not endure emotional and financial injury . and even if such alleged damages were c izable, a claim for them would be precl d by the counterwaiting public policy su rting the preciousness of human life."[34]

While Justice Francis ac pted the arguments and the conclus ns of the majority opinion, he p pared a lengthy concurring opinio in which he presented additional co derations and observations, whic further confirmed and establish d, in his opinion, the majority findi g that the actions, presented by the plaintiffs, were not cognizable in the law and should be dismissed.

In general, Justice Fran is relied on the position that abortion is illegal and criminal in the state of New Jersey and in most other states in every circumstance save where the life of the mother is endangered by the continuation of the pregnancy. Since this is so, the plaintiffs could not expect the doctors either to perform the abortion or even recommend an abortion in the situation where the life and health of the mother were not involved and where only the possibility of the child being born defective was at issue. The conclusion is, therefore, clear: there was no negligence on the part of the defendant doctors; there was no injury to the father, mother or child; there was no action that was cognizable by the law.

The concurring opinion provides an excellent history of abortion legislation and its purpose in New Jersey. The statute was passed in 1849 as a result of a quashing of an indictment for abortion by the Supreme Court in that same year. The reason for the quashing was the requirement in common law that the crime of abortion existed only in the taking of the life of a "quick" child and, in the instant case, *(State v. Cooper,* 22 N.J.L. 52) quickening had not as yet occurred when the pregnancy was terminated.

It was felt that the common law should be modified by a statutory provision and this gave birth to the 1849 statute which forbade abortion at any stage of a pregnancy "without lawful justification." This legislation protected the mother, the child and public morality in a way which the common law could not.

In a footnote, Justice Francis quoted from a dicision of the Supreme Court of Kentucky in an identical case *(Mitchell v. Commonwealth,* 78 Ky. 204) to demonstrate the necessity of legislation to correct the inadequacy of the common law:

"In the interest of good morals and for the preservation of society, the law should punish abortions and miscarriages, willfully produced, at any time during the period of gestation. That the child shall be considered in existence from the moment of conception for the protection of its rights of property, and yet not in existence until four or five months after the inception of its being, to the extent that it is a crime to destroy it, presents an anomaly in the law that ought to be provided against by the law-making department of the government."[35]

With reference to the 1849 statute, which was not substantially changed in the revisions of 1872, 1898, or 1952, Justice Francis remarks:

"The lawmakers were saying as a matter of public policy that the moment the womb becomes instinct with embryonic life, it should be unlawful to interrupt the ordinary development of the life 'without lawful justification.' In my judgment, the more important consequence of the statute is the legislative recognition and sequential incorporation in the law of the principle that the child as a legal entity begins at conception, as of that time it has a legal existence as a separate entity, as distinguished from a mere part of its mother's body. Distinctions based upon physical status during gestation such as embryo, fetus and viability lost their earlier impact on the crime of abortion. It was not until relatively recent years that the judiciary became aware of the fact of the intent of the legislation."[36]

Referring to the argument that the original statute of 1849 made provisions for the health as well as for the life of the mother, the concurring opinion remarked:

"There is nothing in the legislative language to support that idea. It seems to me there were two objectives, of about equal importance. One was to provide greater protection for the child in utero than was given under the common law. To accomplish this, the safeguard against abortion was moved backward from the time when the child became quick, to the moment of conception. Important sequelae have flowed directly or indirectly from this change . . . The unborn child exists as a legal entity from the moment of conception. The second objective was to furnish additional protection for the life and health of the mother by establishing the criminal liability for the abortionist as of the beginning of the pregnancy."[37]

Justice Francis concluded that the abortion in this particular case could hardly be called *therapeutic* and must be considered *eugenic*:

"A termination of pregnancy of the type mentioned in this case is described properly in the Chief Justice's dissent as a eugenic abortion. Eugenics is the science which commits itself to improving the stock, whether human or animal; to means and methods of improving the physical and mental qualities of future generations, to control of mating and reproduction. In the context of a case like the present one, a eugenic abortion would be one based on the probability or possibility that the fetus may be born as a mentally or physically abnormal person. No American statute authorizes such an abortion."[38]

Commenting on eugenic abortion, the concurring opinion noted:

"Yet the eugenic abortion advocates would destroy every fetus when associated with an early pregnancy rubella. . . . there are doctors who feel that abortion in rubella cases represents a negative approach. They hold the view that their profession is devoted to the preservation of life, not to its destruction; that the major efforts in this field should be based on research and pointed toward prevention, not destruction."[39]

Justice Francis concludes his concurring sentence:

"Under all the circumstances of this case, in my judgment it would have been a crime for Doctor Cosgrove or Dolan or any other New Jersey physician to abort the normal pregnancy of Mrs. Gleitman because she had had rubella in the first trimester of her pregnancy. Consequently, the defendants did not violate any legal duty which would make them liable in damages to her or her husband or their child, even if they failed to advise her of the possibility that her child might be defective, and that there were places where she could have an abortion performed, if she elected to do so."

"Furthermore, as I suggested above, no such abortion has ever been sanctioned as lawful in any other state. The contrary appears to be the case, and even more strongly so than in New Jersey, because in all but a minimal number of states, by express statutory provision, preservation of the life of the mother is made the only cause for abortion. But, even if there were some state or foreign country where an abortion for rubella were lawful, in the face of the present strong public policy of New Jersey against such an abortion, no cause of action for damages should be recognized in New Jersey if a local physician did not advise his patient that some such form existed."[40]

Chief Justice Weintraub wrote a partly dissenting opinion in the *Gleitman v. Cosgrove and Dolan* case. He agreed in part with the majority in that the complaint of the child was not cognizable in law but he felt that the parents did sustain a wrong or an injury and, while he conceded that it would be difficult to evaluate the damage in a compensatory fashion, he felt that a jury under judicial supervision could arrive at an equitable settlement.

In his opinion, he made some interesting observations:

"Contraception and abortion have this in common, that whereas in most areas of criminal prohibition the fact of evil is evident to most people, here there is evil or none at all depending wholly upon a spiritual supposition, for while men agree it is wrong to take life, yet knowing nothing about the void before or after their earthly presence they cannot agree upon the point at which a living thing should be thought to be human in its being. We know there is life in the ovum and sperm before conception but as to the morality of contraception, every argument starts from and returns to an ethical or religious assumption. Hence he who opposes and he who supports contraception is equally sure he respects the dignity of man. And so as to abortion, men cannot agree upon the stage at which an embryo or fetus has a claim to acquire life in human form strong enough to override a woman's right to her own bodily integrity."[41]

The Chief Justice, in this quotation, errs by attempting to make contraception, which is the prevention of life, analogous to abortion, which is the taking of life. Also, he indicates that man may find it difficult to determine when human life begins to exist but embryology very clearly states that it begins at conception. He might encounter a difficulty in determining when this human life acquires a right to be born but the legal jurisprudence unhesitatingly states that this right is acquired at conception.

It is inconceivable that the granting and respecting of a fetus' right to live and be born can in any way violate the mother's right to bodily integrity.

"With respect to the claim advanced on behalf of the infant, I agree with the majority that it cannot be maintained. Ultimately the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so."

"We must remember that the choice is not between being born with health or being born without it; it is not claimed the defendants failed to do something to prevent or reduce the ravages of rubella. Rather the choice is between a worldly existence and none at all. Implicit, beyond the claim against a physician for faulty advice, is the proposition that a pregnant woman, who, duly informed, does not seek an abortion, and all who urge her to see the pregnancy through, are guilty of wrongful injury to the fetus, and indeed that every day in which the infant is sustained after birth is a day of wrong. To recognize a right not to be born is to enter an area in which no one could find his way."[42]

"But in other respects the mother is hurt in her own right by the denial to her of her option to accept or reject a parental relationship with the child. The father, too, although his right is wholly dependent upon the mother's decision, is so directly concerned in her decision that he may fairly be regarded as a victim of a wrong done to her."[43]

One is tempted to inquire if it is not a complete inversion of order and values to hold that a woman, who voluntarily consented to a sexual relationship with her husband, which gives rise to the pregnancy, has the right to reject her relationship to the child thus conceived when this rejection deprives him of his basic, fundamental and inalienable right to live and to be born. Can anyone's right ever be considered totally and entirely by itself to the complete exclusion of a consideration of how the rights of others might be violated or denied when said person seeks the honoring of his own personal right?

Since when and by what reasoning did a husband's right over his offspring become so dependent on his wife's rights and decisions to the extent that he can be denied the right to a child merely because his wife, seeking her own pleasure and convenience, has decided to terminate a pregnancy? Has the husband made no contribution to the formation of the fetus?

"It would be difficult to strike a net balance between the intangible pluses and minuses in a parent-child relationship, and it would be the rare case in which a parent would testify that it is his or her present wish that the child had not been born. No one who has witnessed the love of a parent for an imbecile could expect so crass a computation from the parent's lips. But I believe that even without such testimony an outsider could evaluate the injury, and I would recognize a right in the parents to seek that evaluation, subject to careful judicial supervision, in order to support the woman's right to choose whether to risk this misfortune."[44]

From these three cases, it is clear that the courts do not recongize any action of "wrongful life" and do not believe that a fetus has a right "not to be born" when the alternative might be birth with social stigma or birth with physical defects.

8. The Personality Status of Fetal Life in State Constitutions

At this juncture, it is important and useful to inquire what status an unborn child enjoys under State Constitutions. Is a fetus considered for legal purposes to be a person? Kindregan presents a norm and criterion whereby this question can be answered. He suggests that if the fetus is endowed with rights that are customarily granted only to persons, then the fetus is judged to be a person.

"The lawyer can reasonably believe that a fetus is a person because the law has consistently invested fetal life with civil rights in every area of litigation in which the question has arisen. . . . Every indication points toward the conclusion that a fetus is a person under constitutional law because our legal process has consistently treated him as a person vested with civil rights."[45]

Kindregan points to the decisions of two State Supreme Courts – Oregon and Ohio – to demonstrate that the Constitutions of these States clearly identify a fetus as a person. In the *Mallison v. Pomeroy* (205 Or. 690, 291 P. 2d 225 (1955)) case, a suit was brought to recover for injuries that had been sustained by a six month fetus. The Constitution of Oregon "assured a remedy by due course of law to every person for injury done to him in his person. The Supreme Court of Oregon noted that the State had recognized 'the separate entity of an unborn child by protecting him in his property rights and against criminal conduct,' and concluded that an unborn child is a person within the meaning of the state constitution."[46]

The *Williams v. Marion Rapid Transit* case (152 Ohio St. 114, 87 N.E. 2d 334 (1949)) was decided under a provision of the Ohio Constitution which provides that "all courts shall be open, and every person, for an injury done him in his land, goods, person or reputation shall have a remedy by due course of law and shall have justice administered him without denial or delay." (Ohio Constitution, Sec. 16, art. 1)

This action was brought in suit to recover for prenatal injuries that resulted from an accident in which there was alleged negligent operation of a bus. The Supreme Court of the State of Ohio made a finding that the fetus was a person within the meaning and interpretation of the above-mentioned section of the state Constitution:

"to hold that the plaintiff in the instant case did not suffer an injury in her person would require this court to announce that as a matter of law the infant is a part of the mother until birth and has no separate existence in law until that time. In our view such a ruling would deprive the infant of the right conferred by the Constitution of all persons, by the application of a time-worn fiction not founded on fact and within common knowledge unjust and unjustified."[47]

SUMMARY

We have considered the fetus and the unborn child with reference to many and varied rights which he has been accorded by constitutional and statutory law and by jurisprudential judgement: the right of the fetus to sue for prenatal injuries, to receive support, to inherit, to recover under Workmen's Compensation Act, to sue before birth through a legally appointed guardian. Further, we have demonstrated that the law does not recognize an action of wrongful life or the right of a fetus not to be born. Finally, we have established the right of a fetus to be free from criminal assault and to be protected from the negligent actions of others, which might interfere with his right to be born and his basic right to life.

The law recognizes, as does embryology, that human life exists from the moment of conception, that the fetus is a distinct and separate entity from the mother, although dependent upon her for circulatory and nutritional needs, and that this human life is found and vested in a *person* who has rights – not the least of which is the right to live and to be born.

COROLLARY

If the fetus has human life from the very moment of conception and is a legal person, does it have the constitutional guarantee of equal protection with a born child against being deprived of that life without due process of law? If, in fact, it does have and should have this protection, would the proposed legislative statutes to liberalize existing abortion laws be in violation of equal protection and due process?

It would appear only logical and reasonable to expect that law will not contain within itself contradictory provisions or incompatible holdings. If born human life in general is protected by the Federal and State Constitutions and if this life cannot be violated, taken away or extinguished without due process of law, then it would seem mandatory that this same protection be guaranteed to unborn, fetal life, which is recognized by law and jurisprudence to be human life from the very moment of conception and to be vested in a human person, and that this unborn life cannot be tampered with, diminished or extinguished without due process of law. If this be true, then it would seem that the suggested statutes to liberalize present abortion laws would *violate the fourteenth amendment guarantee of equal protection* unless it is proved that the provisions of these statutes do not discriminate against unborn life, as compared to born life, and that the proposed precautions do in fact constitute due process of law.

Kindregan, a professor of law at Suffolk University Law School, states:

". . . repeal of all abortion prohibitions would not be compatible with contemporary understanding of the equal-protection clause of the U. S. Constitution. Equal protection is becoming ever more a positive concept; in this, our constitutional law is reaching toward a more civilized standard of jurisprudence. Can a State simply refuse to provide equal protection for the lives of persons within its jurisdiction because they have not passed through the stage of birth? To do so would violate the positive duty of the State to insure the lives of all persons against arbitrary treatment. Are we prepared to say that the State is maintaining equal protection of law when it allows one person to kill another because he is defective or is just not 'wanted'? The Anglo-American legal tradition consistently recognizes the human person as coming into existence at conception (in property, tort and constitutional law, as well as in criminal law); are the States to now confer licenses of discrimination against persons *in utero*?"[48]

Byrn, a professor of law at Fordham University, maintains:

". . . the child, if he is a separate human entity, is entitled to the protection of the law. The Fourteenth Amendment, of course, forbids state action which deprives a person of the equal protection of the law. . . . . It is for the proponents of abortion to bear the burden of proving that this separate human life (the unborn child) is not a personal life to be protected by the

Fourteenth Amendment. It is interesting that Professor Bernard Schwartz, in speaking about the unconstitutionality of discriminatory legislation directed against Negroes, has said that since we have no scientific evidence to show that the negro is inferior, we may not discriminate against him without running afoul of the Fourteenth Amendment. Apparently we cannot, with any scientific validity establish a different and inferior quality of life in the unborn child; therefore the same principle should apply and we should be able to say to the persons who urge abortion, 'you have not borne your burden of proving that this life is inferior and that it may be treated in an unequal and discriminatory manner by depriving it of the equal protection of the law'."[49]

The same writer proclaims:

"There is no qualitative difference, scientifically speaking, between human life in the womb and human life after birth. Hence, legislation, which would remove the life of a person in the womb from the full and equal protection of the law, would be as discriminatory, as irrational, and as inimical to the *equal protection clause as the legislative classification of races.*"[50] (emphasis supplied)

Louisell, Professor of Law at University of California, Berkeley, in a paper entitled, *Abortion, the Practice of Medicine and the Due Process of Law*, sets forth the following observations:

"The justification of the abortion (under the recommendations of the American Law Institute) would therefore involve no judicial process and no representation of the public interest or that of the husband or unborn child. In fact justification is complete upon the request of the pregnant woman and certification of two physicians without involvement of or even information to any other agency or person, except that the hospital and, in the case of abortion based on felonious intercourse the prosecuting attorney or the police, must be notified. Does this easy path to destruction of the fetus potentially conflict with our ethic of reverence for human life, and the legal norm crystallized in the constituional mandate of due process of law? The question should be considered in the context of the law's historic attitude respecting the fetus as a human person. ... The progress of the law in recognition of the fetus as a human person for all purposes has been strong and steady and roughly proportional to the growth of knowledge of biology and embryology. The current abortion proposals constitute a threat to this progress... the law proceeding apace to recognize in this area (tort actions), as it historically has in other areas, that the unborn child is a human person. ... The basic legal rights of the unborn child are therefore as securely rooted generally as those of other persons. ... But the law forfeits the legal right to life only for grave reason and after due process. The proposed legislation may forfeit life for reasons potentially not grave in relation to the seriousness of the forfeiture itself, and wholly without any process of law – unless the opinion of two physicians can be considered as such. ... It would be strange for the law, society's organ for deciding matters of life and death, to delegate to two physicians – one of whom may have self-interest as the prospective fee-earning surgeon – the exclusive function of deciding who shall live and die. Such a function invokes the due process of law, not the ipse dixit of two physicians ... If the child's right to life is to be weighed for example against a parent's desire to avoid the prospect of a gravely defective child, the ethos of our law would seem to require that the scales be judicial ones, which should register decision only after due process of law. ... The medical profession should be wary of a statute that would formally ordain the legal right of any two physicians to justify an abortion under the nebulous standards proposed. In principle, that profession should be reluctant to exchange its historic role of champion in the struggle for life, for the role of even a well-intentioned judge-executioner. Moreover, physicians as much as many men stand in need of the due process of law, and should realize that the rights of any of us are secure only while those of all are secure."[51]

CONCLUSION

It is inconceivable that a law that recognizes fetal life as human life from the very moment of conception, accepts the fetus as a human person, endowed with many legal rights – not the least of which is the right to be born and to be allowed to grow and develop without interference –, a law that assumes a responsibility to grant to unborn life that equal protection and due process of law, which is guaranteed to all life and is made available to born life, – it is inconceivable that such law would advocate or dare, by statutory revision, to allow the arbitrary taking and extinguishing of unborn life merely to preserve the health, personal happiness or convenience of the mother, to avoid the birth of retarded or physically defective children or to provide a remedy for felonious intercourse.

REFERENCES

1) *Abortion and the Law*, Private Manuscript, pp. 53-53.

2) *California Penal Code*, 270.

3) *People v. Sianes*, 134 Cal. App. 355, 25 P. 2d, 487, 488 (1933).

4) 38 Cal. App. 2d 122, 100 P. 2d 806 (1940).

5) *Metzger v. People*, 98 Colo. 133, 53 P. 2d 1189, 1191 (1936).

6) Herbert, *Is Legalized Abortion the Solution to Criminal Abortion?* 37 University of Colorado Law Review, 284.

7) *On Wills*, 75 (2d ed. 1953).

8) *Hall v. Hancock*, 32 Mass. 255 (1834).

9) *In Re Wells' Will*, 129 Misc. Rep. 447, 221 N. Y. Supp. at 725 (1927).

10) *Morgan v. Susino Construction Company*, 130 N.J.L. 418, 33 A. 2d 607 (Sup. Ct., 1943).

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

12) *Hoener v. Bertinato*, 67 N.J. Super 517, 171 A 2d 140 (1961).

13) *Raleigh Fitkin – Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A. 2d 537 (1964).

14) Barry, *The Child En Ventre Sa Mere*, the Australian Law Journal, Vol. 14, p. 351, footnote n. 5.

15) *Ibidem*, pp. 351, 352.

16) 22 N.J.L. 52, 51 Am. Dec. 77 (1949).

17) 67 N.J. Super, 517, 171 A. 2d 140 (1961).

18) *In Re The Application of the President and Directors of Georgetown College, Inc.* 331 F. 2d 1010 (Washington, D.C., 1964).

19) *Raleigh Fitkin – Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A. 2d 537 (1964).

20) 377 U.S. 985 (1964).

21) *Zepeda v. Zepeda*, 41 Ill. App. 2d 240, 190 N.E. 2d 849 (1963).

22) *Williams v. State*, 46 Misc. 2d 824, 260 N.Y.S. 2d 953 (1965).

23) *America*, July 10, 1965.

24) *loc. cit.*, p. 62.

25) *Williams v. State*, 25 App. Div. 2d 906, 269 N.Y.S. 2d 786.

26) *Ibidem.*

27) *Gleitman v. Cosgrove and Dolan*, 49 N.J. 22, 227 A. 2d 689 (1967) at 690.

28) *loc. cit.* at 691.

29) *loc. cit.* at 692.

30) *Ibidem.*

31) *Ibidem.*

32) *loc. cit.* at 693.

33) *Ibidem.*

34) *Ibidem.*

35) *loc. cit.* at 694, 695.

36) *loc. cit.* at 696.

37) *loc. cit.* at 699.

38) *loc. cit.* at 701.

39) *loc. cit.* at 702.

40) *loc. cit.* at 703.

41) *loc. cit.* at 709.

42) *loc. cit.* at 711.

43) *loc. cit.* at 712.

44) *Ibidem.*

45) *Abortion and the Law*, Private Manuscript, p. 67.

46) *loc. cit.*, pp. 67, 68.

47) *Ibidem*

48) Letter to the Editor, *America* October 21, 1967.

49) *Legal Perspectives of Abort* , Paper presented at the National eting of Diocesan Attorneys at W hington, D.C., April, 1967.

50) Byrn, *Abortion in Pers tive*, 5 Duquesne University Law view, 2, 134-135.

51) Paper prepared for the I rnational Symposium on Abortio held in Washington, D.C., Septembe 967.