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Equal Protection for the Child in the Womb

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During 1971, the drive for liberalized abortion laws stalled after achieving rapid successes in the preceding four years.[1] The law in most American states still allows abortion only where it is necessary to save the life of the mother. Since 1967, however, sixteen states have relaxed their laws to provide that abortions may now be performed in varying situations where the life of the mother is not at stake. Some states, such as New York,[2] allow abortions virtually on request. In other states, laws forbidding abortion have been declared unconstitutional by the courts.[3] During 1971, no further liberalization was enacted in any state. And there was a serious effort, in New York and other states, to tighten and even repeal the liberalizing statutes. The result was a legislative standoff that is likely to continue through the 1972 sessions.

From the point of view of those who would protect the right of the child in the womb to continue living, it would be desirable to emphasize, in addition to the maintenance or restoration of statutory restrictions, a new approach on the constitutional level. The Constitution of the United States can be amended if two-thirds of the states propose an amendment and if it is then submitted by Congress to the states to be ratified by three-fourths of them.[4] It is time to amend the United States Constitution to make its guarantee of equal protection of the laws applicable to the child in the womb. This could be done by inserting the phrase "from the moment of conception" into the Fourteenth Amendment, so that it would read "nor shall any state . . . deny to any person, *from the moment of conception,* within its jurisdiction the equal protection of the laws."[5] Under any proper construction, the Constitution already gives this protection to the child in the womb. But it ought to be made specific for two reasons: First, to prevent any possible misconstruction that would permit the child in the womb, unlike his elder brethren, to be killed for the convenience of others; second, and more important, to serve an educational purpose through the campaign for amendment to carry the issue to the American people and to afford them a clear opportunity to choose life over death.

The Fourteenth Amendment is primarily directed at the action of state and local governments. A similar amendment could be offered to bind the federal government. This could be done by amending the Due Process Clause of the Fifth Amendment[6] so that it would read, "nor

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1. See New York Times, August 20, 1971, p. 9, col. 1.
2. Ch. 127 (1970), New York Laws 170 (McKinney 1970).
3. See, e.g., Babbitz v. McCann, 310 F. Supp. 293 (E. D. Wis. 1970).
4. U.S. Const. art. IV.
5. Emphasis added.
6. U.S. Const. amend. V: "nor shall any person . . . be deprived of life, liberty, or property without due process of law; . . ."

shall any person, *from the moment of conception* . . . be deprived of life, liberty, or property, without due process of law."[7] Both amendments, to the Fifth and the Fourteenth Amendments, I believe desirable. Space limitations, however, permit a discussion here only of factors relating to the proposed amendment of the Equal Protection Clause of the Fourteenth Amendment.

This suggested amendment would make explicit the status of the child in the womb as a person—a status which, as yet, has not been acknowledged by the Supreme Court but which is implicit in the settled case law in other areas. In *Levy* v. *Louisiana*,[8] the Supreme Court said:

> We start from the premise that illegitimate children are not "nonpersons." They are humans, live, and have their being. They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.[9]

The child in the womb meets these criteria of personhood under the Equal Protection Clause. He is human, he lives, and he has his being. That is, he is a living human being. As the highest court of New Jersey summarized the state of scientific knowledge in 1960, "Medical authorities have long recognized that a child is in existence from the moment of conception."[10]

The character of the child as a person is clearly recognized for purposes of tort recovery. The attitude of the law of torts toward the child in the womb was summarized by Dean William L. Prosser:

> So far as duty is concerned, if existence at the time is necessary, medical 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 law of property considers it in being for all purposes which are to its benefit, such as taking by will or descent. After its birth, it has been held that it may maintain a statutory action for the wrongful death of the parent. So far as causation is concerned, there will certainly be cases in which there are difficulties of proof, but they are no more frequent, and the difficulties are no greater, than as to many other medical problems. All writers who have discussed the problem have joined in condemning the old rule, in maintaining that the unborn child in the path of an automobile is as much a person as the mother, and in urging that recovery should be allowed upon proper proof.[11]

It is significant that a majority of courts, keeping pace with advancing scientific knowledge, now hold that even a stillborn child may maintain a wrongful death action where his death was caused by prenatal injury.[12] A similar trend can be seen in the law of property. As

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7. Emphasis added.
8. 391 U.S. 68 (1968).
9. 391 U.S. at 70.
10. Smith v. Brennan, 31 N.J. 353, 362, 157 A. 2d 497, 502 (1960).
11. Prosser, **Handbook of the Law of Torts** (4th Ed., 1971) at 336.
12. Kwaterski v. State Farm Mutual Ins. Co., 34 Wis. 2d 14, 148 N.W. 2d 107 (1967); State to Use of Odham v. Sherman, 234 Md. 179, 198 A. 2d 71 (1964); see also Prosser, supra at 338.

long ago as 1946, it was noted in *Bonbrest* v. *Kotz*[13] that:

> From the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as a human being, but as such from the moment of conception—which it is in fact.[14]

The law of property has long recognized the rights of the child for purposes which affect the property rights of that child. In *Thellusson* v. *Woodford*,[15] the court recognized the contention that a devise for the life of a child in the womb was void because such a child was a nonentity:

> 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.[16]

When the property rules of the English common law were adopted by American courts, the same approach was taken:

> It has been the uniform and unvarying decision of all the 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.[17]

Indeed, there is authority for the proposition that the child in the womb will be regarded as in existence even where it is against his interest to do so.[18]

For purposes of equity, too, the law has recognized the existence of the child in the womb. An unborn child, for example, can compel his father to provide him support.[19] He can compel his mother to undergo a blood transfusion for his benefit, even where such transfusion is forbidden by the mother's religious beliefs. In *Raleigh Fitkin-Paul Morgan Memorial Hospital* v. *Anderson*,[20] the mother for religious reasons refused to have a blood transfusion which was necessary to save the life of the child in her womb. The court held that the right of the child to live outweighed the mother's right to free exercise of her religious beliefs. The court said:

> 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.[21]

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13. 65 F. Supp. 138 (D.D.C. 1946).
14. 65 F. Supp. at 140.
15. 4 Ves. 227, 31 Eng. Rep. 117 (1798).
16. 31 Eng. Rep. at 163.
17. In re Holthausen's Will, 175 Misc. 1022, 1024, 26 N.Y.S. 2d 140, 143 (Surr. Ct. 1941).
18. In re Sankey's Estate, 199 Cal. 391, 249 P. 517 (1926).
19. Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P. 2d 806 (1940); Metzger v. People, 98 Col. 133, 53 P. 2d 1189 (1936).
20. 42 N.J. 421, 201 A. 2d 537 (1964), cert. den. 377 U.S. 985 (1964).
21. 42 N.J. at 423, 201 A. 2d at 538.

It would be possible to multiply medical opinions[22] and reinforcing legal decisions in support of the proposition that the child in the womb should be recognized as a person within the meaning of the Equal Protection Clause. Suffice it to say that the child in the womb satisfies the three criteria for personhood—he is human, he lives, and he has his being—enunciated in *Levy*. He is clearly alive and in being. As the living offspring of human parents, he can be nothing else but human. As a living human being, he is therefore a person within the meaning of the Equal Protection Clause.

Even if somehow one does not concede that the child in the womb is a living human being, one ought at least to give him the benefit of the doubt. Our law does not permit the execution, or imprisonment under sentence, of a criminal unless his guilt of the crime charged is proven beyond a reasonable doubt. The innocent child in the womb is entitled to have us resolve in his favor any doubts we may feel as to his living humanity and his personhood. His status and his right to continue living are widely denied him under the cover of a specious denial of his personhood. It is time to give him a protection that will be explicit and effective. The proposed amendment would not prevent the law from making a reasonable distinction on such matters as the right to inherit and the right to sue. But it would ensure that the child in the womb, as with older persons, would not be subject to being killed for the convenience of others or because those others consider him unfit to live. In terms of his right to continue living, the proposed amendment would place the child in the womb on a par with his elder brother. It would conform the law to the realities of science. And its adoption would affirm the determination of our nation to protect the liberty of all regardless of age or condition.

22. See e.g. Patten, Foundations of Embryology (1964) at 35, 82.