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The Constitutionality of the Regulation of Abortion

By JOHN T. NOONAN, JR.*

IN a variety of ways Anglo-American common law and California statutory and case law have developed a recognition of the legal personality of the human fetus. The fetus is now treated as a being capable of inheriting property,¹ suffering tortious injury,² and under some circumstances, having his rights preferred to adults.³ By virtue of these developments in the law, the fetus is the center of legal interests. The basic premise of this article is that if the state may restrict the freedom of individuals to impair these rights of the fetus, it may also restrict the freedom of individuals to destroy the fetus itself.

The State's Interest in Preserving Fetal Life

The approach of the courts is not a Pickwickian one, making something that does not exist in nature exist in law; it is a true evolution of the law in response to established medical and biological data. The rights conferred by case law and statute on the conceived being are conferred on a being qualitatively distinct from the spermatozoon and ovum that originally meet to form it. The newly conceived fetus possesses something not possessed by its individual components, the genetic (DNA) code, which transmits the human constitution.⁴ At the same time, this new being represents a dramatic jump in potentiality for survival. Of the approximately two million spermatozoa in a normal ejaculation, only one has a chance of developing into a zygote,⁵ and of the one million oöcytes in a female at birth, 390 at most have a chance of becoming ova;⁶ but once spermatozoon and ovum meet and the conceptus is formed, there is an 80 percent chance that unless deliberately

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1. *E.g.*, CAL. PROB. CODE § 250; see text accompanying notes 4-12 *infra*.

2. *E.g.*, *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946); see note 25 *infra*.

3. *E.g.*, *Barnett v. Pinkston*, 238 Ala. 327, 191 So. 371 (1939).

4. See F. GOTTLIEB, *DEVELOPMENTAL GENETICS* 17 (1966).

5. J. BAXTER, *FRAZER'S MANUAL OF EMBRYOLOGY* 5 (3d ed. 1953).

6. G. PINCUS, *THE CONTROL OF FERTILITY* 197 (1963).

aborted, the being will be delivered as a living child.⁷ It is understandable then, that the law, looking at this new being who has such a high probability of life, has recognized the fetus as a possessor of rights and interests.

Property Rights

The first area in which the rights of the fetus, at all stages of fetal existence, were recognized by the law was in the realm of property law. In *Doe v. Clark*⁸ an English court interpreted the ordinary meaning of "children" in a will to include a child in the womb. "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.'"⁹ *Thellusson v. Woodford*¹⁰ rejected the contention that this was a mere rule of construction invoked for the benefit of the child. "Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons."¹¹ To the argument that such a child was a non-entity, the court replied:

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.¹²

When the English property rules were adopted by American courts, the same approach was taken. In *Hall v. Hancock*¹³ the issue was whether a bequest to grandchildren "living at my decease" was valid.¹⁴ The Supreme Judicial Court of Massachusetts was asked to say that "*in esse*" was not the same as "living," and that for a child to be "living," the mother must be at least "quick."¹⁵ The court held, however, that a conceived child fell within the meaning of the word "living":

[A] child *en ventre sa mere* is a person *in rerum naturâ*, so that, both by the rules of the civil and common law, he is to all intents and purposes a child, as much as if born in the father's lifetime.¹⁶

This development of Anglo-American common law has been codi-

7. *Id.*

8. 126 Eng. Rep. 617 (C.P. 1795).

9. *Id.* at 618.

10. 31 Eng. Rep. 117 (C.P. 1798).

11. *Id.* at 164 (Buller, J.).

12. *Id.* at 163 (Buller, J.).

13. 32 Mass. (15 Pick.) 255 (1834) (Shaw, C.J.).

14. *Id.*

15. 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. 1951).

16. 32 Mass. (15 Pick.) at 258, Shaw, C.J., quoting *Wallis v. Hodson*, 26 Eng. Rep. 472 (Ch. 1740).

fied in California. Section 250 of the Probate Code provides that "[a] posthumous child is considered as living at the death of the parent. . . ." and section 255 of the Code, amended as recently as 1961, provides that an illegitimate child is the heir of his mother, whether the child is "born or conceived."

The property cases establish two propositions. First, when the ordinary person employs the word "children" in a will, he is understood to include in that term children conceived but not yet born. This interpretation has not been criticized as fanciful or arbitrary, nor has it been imposed by a court in pursuance of some theological scheme. Rather, it has been generally accepted as a fair interpretation of the ordinary use of language and of the ordinary person's conception of who are "children." Second, a child in the womb has rights in property transmitted by trust, will, or the laws of intestate succession to a class of persons within which that child falls. From these propositions it follows that the state may properly protect the safety of those whom ordinary language designates as "children," and that it may properly prevent the unregulated extinction of those who may possess property. It would indeed be a strange inversion of values if it were a crime for a parent to fraudulently appropriate the income of an unborn fetus, but no crime to destroy the recipient of that income.

Tort Law

In the area of tort law, there has recently been a dramatic improvement in the legal status of the fetus. Well into the twentieth century most American decisions denied recovery in tort to human offspring harmed while in the womb.¹⁷ This denial was justified in part by the danger of fraudulent claims, and in part by the difficulty of proving causation, but principally on the ground that "the defendant could owe no duty of conduct to a person who was not in existence at the time of his action."¹⁸ This theory was succinctly expressed by Justice Holmes in *Dietrich v. Northampton*:¹⁹ "[T]he unborn child was part of the mother at the time of the injury"²⁰

The California legislature has pioneered in rejecting this doctrine. Section 29 of the Civil Code provides: "A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for

17. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 354 (3d ed. 1964) [hereinafter cited as PROSSER].

18. PROSSER 355.

19. 138 Mass. 14 (1884).

20. *Id.* at 17.

its interests in the event of its subsequent birth." In *Scott v. McPheeters*²¹ the court held that on the basis of this code section a child might sue for an injury incurred in delivery.

The respondent asserts that the provisions of section 29 of the Civil Code are based on a fiction of law to the effect that an unborn child is a human being separate and distinct from its mother. We think that assumption of our statute is not a fiction, but upon the contrary that it is an established and recognized fact by science and by everyone of understanding.²²

Since 1946 most American courts have followed the California approach.²³ For a time there was hesitation about whether the permissible group of plaintiffs was limited to infants who were "viable,"²⁴ or "quick,"²⁵ at the time of the injury;²⁶ but the majority of courts have imposed no such limitation on the right to recover.²⁷ "Viability" of a fetus is not a constant, but depends on the anatomical and functional development of the particular baby.²⁸ It can also depend on the environment to which the fetus is delivered, as has been demonstrated clinically with animals.²⁹ There seems no good reason to condition the rights of a fetus on the shifting and uncertain standard of age within the womb. As Professor Prosser observes: "Certainly the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs."³⁰

In six states recovery for any injury to the fetus is conditioned on the child being born alive.³¹ This result has been reached because of

21. 33 Cal. App. 2d 629, 92 P.2d 678 (1939).

22. *Id.* at 634, 92 P.2d at 681.

23. Prosser states: [A] series of more than thirty cases, many of them expressly overruling prior holdings, have [*sic*] brought about the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts. PROSSER 355-56.

24. "This term [viable] is applied to a newly-born infant, and especially to one prematurely born, which is not only born alive, but in such a state of organic development as to make possible the continuance of its life. BLACK'S LAW DICTIONARY 1737 (4th ed. 1951).

25. See note 15 *supra*.

26. See PROSSER 356.

27. See *id.* 356-57 and 356 n.44 (citing nine jurisdictions).

28. See J. MORISON, FETAL AND NEONATAL PATHOLOGY 99-100 (1963). The weight and length of the fetus are better guides than age to the state of fetal development; however, weight and length vary with the individual. See Gruenwald, *Growth of the Human Fetus*, 94 AM. J. OF OBSTET. & GYN. 1112 (1966). Moreover, different racial groups have different ages at which their fetuses are viable. For example, there is some evidence that Negro fetuses mature more quickly than Caucasian fetuses. See J. MORISON, *supra* at 101.

29. Brinster & Thomson, *Development of Eight-Cell Mouse Embryos in Vitro*, 42 EXPERIMENTAL CELL RESEARCH 308 (1966).

30. PROSSER 356-57.

31. *Norman v. Murphy*, 124 Cal. App. 2d 95, 268 P.2d 178 (1954); Prabbels

the difficulty of proof, the danger of double recovery (if a mother also sues for miscarriage), or the peculiarity of the language in a wrongful death statute.³² *Norman v. Murphy*³³ is the only California case falling within the last of the above rationales. There the court held that a 4½ month old fetus killed as the result of an automobile accident was not a "minor person" within section 377 of the Code of Civil Procedure.³⁴

Assuming *arguendo* that *Norman v. Murphy* is controlling California law, does its holding impair the rule of *Scott v. McPheeters*³⁵ that a child injured in the womb has legal rights? It is apparent that the requirement of survival to birth says nothing about what rights may be infringed before birth; after all, at common law before the enactment of the wrongful death acts, "[i]f it were conceded that killing the plaintiff was a tort toward him, he was none the less dead, and the tort died with him."³⁶ It could not be maintained that no injury was done by destroying the person; the nature of the injury simply prevented recovery for the wrong. Nor could it be said that the law did not recognize a trespass, an assault and battery, and medical malpractice torts simply because none of these actions survived if the plaintiff died.³⁷ Plainly, if a cause of action arises for an injury inflicted at a given time, a legally protected interest must have existed at that time and no requirement of survivorship can detract from the recognition of its existence. Thus, in the cases requiring the fetus to survive, a legal personality is recognized as existing in the womb; it may be tortiously invaded even though redress for the tort may come only if the further requisite of birth is met.

The foregoing discussion has been premised on the assumption that *Norman v. Murphy* is the prevailing law in California. It may be, however, that in a future case the California Supreme Court will follow the majority rule and permit recovery although the fetus dies because

v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229 (1951); *In re Logan's Estate*, 3 N.Y.2d 800, 144 N.E.2d 644, 166 N.Y.S.2d 3 (1957); *Howell v. Rushing*, 261 P.2d 217 (Okla. 1953); *West v. McCay*, 233 S.C. 369, 105 S.E.2d 88 (1958); *Hogan v. McDaniel*, 204 Tenn. 235, 319 S.W.2d 221 (1958).

32. PROSSER 357.

33. 124 Cal. App. 2d 95, 268 P.2d 178 (1954), criticized in Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 596 (1939).

34. CAL. CODE CIV. PROC. § 377: "When the death of . . . a minor person who leaves surviving him . . . father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death"

35. Case discussed in text accompanying notes 21-22 *supra*.

36. PROSSER 923.

37. See generally *id.* at 920-23.

of the tort.³⁸ The trend is reflected in the Massachusetts case of *Torigian v. Watertown News Company*,³⁹ in which the defendant's truck had negligently struck the intestate's mother, who was 3½ months pregnant with intestate at the time. The impact caused the fetus' premature birth and subsequent death eight weeks after the accident. As the court put it: "There was medical testimony that the accident of January 2 was the adequate cause of the premature birth, and that the cause of death was prematurity."⁴⁰ Death was thus caused by one of the classic methods of abortion, forced premature delivery of a non-viable fetus. The court had to decide whether an action in tort lay for such death: "We are not impressed with the soundness of the arguments against recovery. They should not prevail against logic and justice."⁴¹ The fetus was held to be a person covered by the state's wrongful death statute.⁴²

The revolution in tort law has recognized rights in the fetus at every stage of life and has refused to condition recovery on survivorship. The dean of authorities on tort law notes that all writers on the subject have maintained "that the unborn child in the path of an automobile is as much a person in the street as the mother . . ."⁴³ Can such a child become less a person when, instead of an automobile, another agency is directed to his destruction? If the state may protect this person by allowing court action awarding damages for tort, it should not be impotent to protect the same being by criminal sanctions.

Preference for the Fetus over the Parents

Despite the precedents of property and tort law recognizing the rights of the fetus, it might be argued that the law does not accord this recognition where the interests of the fetus clash with those of his parents. The modern civil law that has developed in this unusual area, however, is to the contrary. Where the life of the fetus is in balance with some lesser interest of the parent, the fetus has been preferred.⁴⁴

38. See *id.* at 357.

39. 352 Mass. 446, 225 N.E.2d 926 (1967).

40. *Id.* at 447, 225 N.E.2d at 926.

41. *Id.* at 449, 225 N.E.2d at 927.

42. *Id.* The tort development of the legal rights of the fetus is taken as a prime example of the effect of scientific development on law in E. PATTERSON, *LAW IN A SCIENTIFIC AGE* (1963). The author states that "[t]he meaning and scope of even such a basic term as 'legal person' can be modified by reason of changes in scientific facts—the unborn child has been recognized as a legal person, even in the law of torts." *Id.* at 35.

43. PROSSER 355.

44. *E.g.*, Application of President & Directors of Georgetown College, 331 F.2d

One example of this preference has arisen because of the advances of medicine in the science of fetology. Techniques have now been developed to make lifesaving transfusions of blood to fetuses who have developed acute anemia in the womb caused by the incompatibility of the fetus' blood with the mother's blood.⁴⁵ Where the parent by religious conviction has believed it sinful to permit a blood transfusion, a conflict of interest between fetus and parent has occurred. In one such case in which the hospital involved sought a court order authorizing the transfusion, Judge Wright observed: "The state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments. The [mother] had a responsibility to the community to care for her infant."⁴⁶

Judge Wright's dictum was followed in the similar New Jersey case of *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*.⁴⁷ Again, one of the most fundamental of constitutional rights, the right to practice one's religious beliefs, had been asserted. It might be expected that this most fundamental right would have led the court to subordinate the fetus' interest in survival to the constitutional right of the parents to practice their religion and thereby effect an abortion by denying blood to the fetus. Instead, the life of the fetus was treated as having a value outweighing even this most valued constitutional liberty.⁴⁸ The court found no difference between the present case of a fetus likely to be aborted if denied blood, and the case of a "blue baby" suffering from lack of oxygen after birth.⁴⁹ In a unanimous per curiam opinion the court declared: "We are satisfied that the unborn child is entitled to the law's protection. . . . We [had] no difficulty in so deciding with respect to [an] infant child."⁵⁰

This choice between the interests of the fetus and the civil rights of the parents has been presented in a different context in California. *Kyne v. Kyne*⁵¹ was a suit brought by a fetus' guardian *ad litem* when

1000 (D.C. Cir. 1964); *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964).

45. H. LILEY, *MODERN MOTHERHOOD* 42 (1967).

46. Application of President & Directors of Georgetown College, 331 F.2d 1000, 1008 (D.C. Cir. 1964).

47. 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964).

48. *Id.* at 422, 201 A.2d at 538.

49. In *State v. Ferricone*, 37 N.J. 463, 181 A.2d 751, cert. denied, 371 U.S. 890 (1962), the New Jersey court had ordered a transfusion for a "blue baby" suffering from lack of oxygen despite the parents' religious objections.

50. 42 N.J. at 423, 201 A.2d at 538.

51. 38 Cal. App. 2d 122, 100 P.2d 806 (1940).

the fetus was less than six months old seeking to compel the father to provide support. The court applied section 196a of the Civil Code, which provided that "[t]he father as well as the mother of an illegitimate child must give him support and education suitable to his circumstances." The court held that section 29 of the Civil Code⁵² "must be read together with section 196a so as to confer the right on an unborn child through a guardian *ad litem* to compel the right to support conferred by the code."⁵³

The court fortified its conclusion with a reference to *Scott v. McPheeters*⁵⁴ and *People v. Yates*.⁵⁵ In the latter case, the appellate department of the superior court invoked section 270 of the Penal Code to protect a fetus. The statute makes it a misdemeanor for a father to wilfully fail "to furnish food, clothing, shelter or medical attendance or other remedial care" to his "child," and "child" is defined by the statute to include "a child conceived but not yet born." The court held that a misdemeanor was committed by failure to supply food and care to the fetus, even though such food and care would be supplied by the mother indirectly.⁵⁶

It would be strange if a fetus had rights to support from his parents, rights enforceable by a guardian and sanctioned by the criminal law, and yet have no right to be protected from an abortion. By the same token, it would be incongruous that a fetus should be protected by the state from wilful harm by a parent when the injury was inflicted indirectly (*e.g.*, by refusal to permit blood transfusion), but not when it was inflicted directly by abortion. The California decisions recognize that where a choice must be made between the life of the fetus and the convenience or desires of the parents, the law will make the parents subordinate their interests in order to preserve the life in the womb.

A Locus of Rights

The law has found a recognizable locus of human rights in the fetus from the time of its conception. It would be hard to pretend that this convergent development of property, tort, welfare, and constitutional law was at the dictate of some hidden and impermissible theological im-

52. See text accompanying notes 18-19 *supra*.

53. 38 Cal. App. 2d at 127, 100 P.2d at 809.

54. Case discussed in text accompanying notes 21-22 *supra*.

55. 114 Cal. App. 782, 298 P. 961 (Super. Ct. App. Div. 1931). *Scott v. McPheeters* and *People v. Yates* were referred to in 38 Cal. App. 2d at 127-28, 100 P.2d at 809.

56. 114 Cal. App. at 788, 298 P. at 963; *accord*, *People v. Sianes*, 134 Cal. App. 355, 25 P.2d 487 (1933).

pulse. Such sturdy guardians of secular good sense as Justice Buller⁵⁷ and Chief Justice Shaw⁵⁸ invented no imaginary being by holding that the unborn child could have rights of inheritance. It is equally unlikely that Professor Prosser, when he found all commentators treating a fetus in the womb on a par with the mother who was in the path of an automobile, was indulging in metaphysical fantasy.⁵⁹ Provisions in several California statutes that a conceived child is to be treated like a born child were certainly not an exercise in fiction-making by the legislature, nor have California courts imposed some artificial concept upon the world by treating the unborn as possessor of rights.⁶⁰

That the California approach is not some local peculiarity is testified to by the convergence of American decisions in this area, and action taken by the United Nations indicates that this is not just a national aberration. In 1959, the United Nations adopted a "Declaration of the Rights of the Child" which supplemented its statement entitled the *Universal Declaration of Human Rights*. One reason for this supplementary declaration was stated in its Preamble to be that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*."⁶¹ Thus, the representatives of most of the civilized nations of the world recognized not only that a human being before birth deserves to be treated as a "child," but also that a child, so defined, needs legal protection. The rights asserted by the United Nations, as applicable to the fetus, represent a commitment to which all the various social systems represented within that worldwide body have acceded.⁶²

If the fetus can inherit by will and by intestacy, be the beneficiary of a trust, be tortiously injured, be represented by a guardian seeking present support from the parent, be preferred to the religious liberties of the parent, and be protected by the penal statutes from parental neglect, then legal interests exist here that the state may protect from intentional extinction as well.

Countervailing Interests

The Life and Health of the Mother

The clearest countervailing value to the life of the fetus is the life

57. See text accompanying notes 10-12 *supra*.

58. See text accompanying notes 13-16 *supra*.

59. See text accompanying notes 16, 19-20 & 55-56 *supra*.

60. See text accompanying notes 51-53 *supra*.

61. G.A. Res. 1386, 14 U.N. GAOR Supp. 16, at 19, U.N. Doc. A/4354 (1959) (adopted unanimously) (emphasis added).

62. See U.N. GAOR, 3d Comm. 593 (1959).

of the mother who carries it. In the rare case where a choice must be made between them, reason cannot demand that the mother must prefer her unborn child's life to her own. The usual state statute recognizes that an abortion may be performed if "necessary to preserve" the mother's life.⁶³ In California the definition of "preserve" has been expanded by the courts to include preservation of the mother's life in the sense of preventing ill health from shortening it.⁶⁴ Packer and Gampell found in their survey that in practice 17 out of 21 hospitals would perform an abortion when there was a "substantial probability" that continuance of the pregnancy would affect the duration of the mother's life.⁶⁵

When there is no grave maternal disease making pregnancy extremely hazardous to the mother, the usual statute has preferred the interest of the fetus in life to the mother's interest in health.⁶⁶ Statutes like the present sections 25950-25954 of the Health and Safety Code raise a serious constitutional question, however. These provisions of the code permit abortion if pregnancy presents substantial risk to the physical or mental health of the mother. If the health justification is interpreted to make the good health of the mother superior to the life of the fetus, it would appear that one class of persons is being denied the equal protection of the law, on the ground that the lives of the persons in this class are being taken to secure the less vital interests of another class. It seems constitutionally impermissible to deny protection of the law to beings recognized as persons in property, tort, and the Civil Code; yet the health justification could be interpreted in a traditional way as a recognition of the interest of the mother in being free from a

63. *E.g.*, CAL. PEN. CODE § 274; NEW YORK PENAL LAW § 125.05 (McKinney 1967).

64. *See, e.g.*, *People v. Ballard*, 167 Cal. App. 2d 803, 335 P.2d 204 (1959): "Surely the abortion statute (Pen. Code § 274) does not mean by the words 'unless the same is necessary to preserve her life' that the peril to life be imminent. It ought to be enough that the dangerous condition 'be potentially present' Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him" *Id.* at 814, 335 P.2d at 212 (court's emphasis).

65. Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 439 (1959). Most physicians use the term "therapeutic abortion" to mean an abortion "produced ethically because of some grave maternal disease which [makes] continuation of the pregnancy extremely hazardous." N. EASTMAN, *EXPECTANT MOTHERHOOD* 112 (4th rev. ed. 1963).

66. *E.g.*, CAL. PEN. CODE § 274; NEW YORK PENAL LAW § 125.05 (McKinney 1967). *See People v. Pollum*, 97 Cal. App. 2d 173, 217 P.2d 463 (1950), where the conviction for abortion was sustained even though the prosecutrix had lost much weight during the pregnancy, was in an anemic condition, had been advised that she could not undergo normal childbirth, and that a Caesarian operation would be required.

life-shortening disease, or in the realization that physicians must have some latitude in determining what conditions threaten life. Few pregnancies carry an imminent risk to life, but a number of them threaten life by a substantial impairment of health; therefore, to balance a mother's interest in being free from a life-shortening disease against the fetus' interest in life may not overstep the constitutional line. Analogy is afforded by the usual rule treating as justifiable homicide killing done to repel a threat of substantial bodily injury.⁶⁷ A rule of self-preservation where life is balanced against life does not offend the respect which the constitution demands for the life of every person.

The Physician's Professional Judgment

The position most recently taken by the House of Delegates of the American Medical Association (similar to the one proposed in a draft by the American Law Institute) is that abortion should be prohibited by the state except on precise and limited grounds.⁶⁸ The resolution declares that "the American Medical Association is opposed to induced abortion" except in a limited number of circumstances under conditions that include examination of the patient by two additional physicians and performance of the operation "in a hospital accredited by the Joint Commission on Accreditation of Hospitals."⁶⁹

The unrestricted freedom of the physician to prescribe or perform abortions is not a freedom sought by the medical profession. It is, moreover, at odds with one of the oldest traditions of the medical profession, the Hippocratic Oath, which is still called to the mind of many young doctors on their graduation from medical school: "[I pledge] not to give a deadly drug (*pharmakon*) to anyone if asked for it, nor suggest it. Similarly, I will not give a woman an abortifacient pessary. In purity and holiness I will guard my life and my art."⁷⁰

The consequences, furthermore, of a broad claim that the state cannot intervene between professional judgment and patient should be considered. There has been a gradual change within the medical profession in the concept of a physician's duty. From a duty of treating the specific ills of a patient, this duty has evolved in the minds of some leaders of the profession into a duty of keeping the patient in "health." "Health" in this context is understood to encompass not only free-

67. MODEL PENAL CODE § 3.04 (Proposed Official Draft 1962).

68. House of Delegates of the American Medical Association, *AMA Policy on Therapeutic Abortion*, 201 J.A.M.A. 544 (1967). Compare MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962).

69. House of Delegates of the American Medical Association, *AMA Policy on Therapeutic Abortion*, 201 J.A.M.A. 544 (1967).

70. THE HIPPOCRATIC OATH 3 (Edelstein ed. 1943).

dom from physical disease but also a state of good relations within a community network.⁷¹ If the physician is to seek health in this expanded, positive sense, the matters subject to his professional good judgment are infinite. If the state could not constitutionally regulate the exercise of that judgment, legislators and courts alike would be superfluous, supplanted by a wise elite of doctors. In a democratic society, trust cannot be placed with a body of experts to determine issues of life and death, however qualified, well motivated and devoted that body may be. The balancing of vital interests must be done, not by a professional elite, but by the representatives of the community.

The Interest of Marital Privacy

There is an interest of husband and wife in preserving their conjugal relations from state interference, an interest which, in *Griswold v. Connecticut*,⁷² was found to be violated by Connecticut's statute forbidding the use of contraceptives. The law, which interfered with the most private aspect of the marital relation, sexual intercourse, was more stringent and sweeping than any statute, civil or ecclesiastic, in the history of social efforts to control contraception.⁷³ It made it criminal for a married couple to engage in sexual intercourse when using contraceptives; enforcement required actual invasion of the marital bedchamber.

In contrast, the usual statute restricting abortions does not affect the sexual relations of husband and wife. Pregnancy does not interfere with these relations except under some circumstances and only for a limited time.⁷⁴ Prevention of abortion does not entail, therefore, state interference with the right of marital intercourse; nor does enforcement of the statute require invasions of the conjugal bedroom.

Assuming *arguendo* that there are other marital rights the state must respect, may it then be urged that one of these rights is the freedom of a married couple not to have, raise, and educate a child they do not want? Certainly from the viewpoint of both the parents and the child it is important that the child be wanted; but the parents' attitude toward their offspring cannot be made the single criterion of the fetus' right to continue in existence.

In this area there has been a gradual evolution of civilized thought. In the Roman Republic, the father, by virtue of the *patria potestas*,

71. See Constitution of the World Health Organization, *opened for signature* July 22, 1946, 62 Stat. 2679, T.I.A.S. No. 1808, 14 U.N.T.S. 185.

72. 381 U.S. 479 (1965).

73. See generally J. NOONAN, *CONTRACEPTION* 491 (paperback ed. 1965).

74. See GUTTMACHER, *PREGNANCY AND BIRTH* 88 (1962).

had the literal power of life or death over his children.⁷⁵ "Within the family the *paterfamilias* enjoyed a lifelong despotism . . ."⁷⁶ In the Roman Empire, however, this freedom to deal with one's children as one pleased was limited by the state, although infanticide was still widely practiced, and abortion with the consent of the father was legal.⁷⁷ The basic concept of the law was that a fetus was a part of the woman.⁷⁸ No protection was accorded to this being within the womb, rather the law guarded the father's right to determine this being's destiny.

It was only as the boundaries of the modern Western European nations began to form that laws were adopted protecting the fetus. In England only the fetus that was already formed was protected;⁷⁹ it was not until 1803 that English criminal law, following the judicial lead given by the property cases, safeguarded the fetus at all stages of existence.⁸⁰ In the nineteenth century the American states followed this English precedent.⁸¹

Thus over a period of about 2500 years a defense has been built up by the state in behalf of children, born and unborn, against the aggressive and proprietary instincts of their progenitors. There is no evidence that the child of today is any less in need of the restraint placed by the law upon parental action.⁸²

The evolution that occurred in criminal law, as has been indicated, followed the path set in the property cases; and the property cases, in turn, followed the development in medical knowledge. Prior to the seventeenth century the prevailing doctrine had been based upon Aristotle's notion that 40 days after conception the fetus underwent a transformation that placed him in the human class. This notion was successfully attacked as metaphysical nonsense in 1621 by Paolo Zacchia's *Quaestiones Medico-Legales*.⁸³ Thereafter, the medical profession gradually accepted the view that there was no valid line to be drawn within the womb; the law followed the medical lead.

75. B. BIONDI, *IL DIRITTO ROMANO* 90-91 (1957).

76. W. BUCKLAND & A. MCNAIR, *ROMAN LAW & COMMON LAW* 35 (1936).

77. J. NOONAN, *supra* note 73, at 113.

78. See *DIGEST* 24.4.1.1 (Digest of Justinian).

79. 2 H. BRACON, *DE LEGIBUS ET CONSUETUDINIBUS* 279 (Twiss ed. 1879). See generally Noonan, *Abortion and the Catholic Church: A Summary History*, 12 *NATURAL L.F.* 128 (1967).

80. 43 *Geo.* 3, c. 58, § 2 at 758 (1803).

81. See J. BISHOP, *COMMENTARIES ON THE LAW OF STATUTORY CRIMES* § 746 (2d ed. 1883).

82. See generally Kempe, Silverman, Steele, Droegmueller & Silver, *The Battered-Child Syndrome*, 181 *J.A.M.A.* 17 (1962).

83. P. ZACCHIA, *QUAESTIONES MEDICO-LEGALES* 9.1 (1621).

Today there can scarcely be a return to the Roman law theory that a parent has absolute dominion over his offspring or to the ancient notion that a fetus is "part" of his mother. The new science of fetology, brought into existence by Liley's work on blood transfusions to the fetus, has destroyed old myths.⁸⁴ The organs and the blood of the fetus are his own; at six weeks, the features of his face are visible; they are the features of a human face.⁸⁵ Even the persistent belief that the placenta was part of the mother has been exploded.⁸⁶ "More than any living species," the fetus "dominates his environment."⁸⁷

The head, housing the miraculous brain, is quite large in proportion to the remainder of the body, and the limbs are still relatively small. Within his watery world, however (where we have been able to observe him in his natural state through a sort of closed-circuit x-ray television set), he is quite beautiful, perfect in his fashion, active and graceful. He 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, as independent as though he were lying in a crib with a blanket wrapped around him instead of his mother.⁸⁸

Medical developments confirm the soundness of the law in treating the fetus as a being with rights not dependent on his parents.

It has come to be seen that "the nine months spent by the individual in the womb are fundamental. It is during these nine prenatal months that the individual's foundations are . . . laid To an extent rather more profound than we had hitherto suspected, the individual's prenatal past influences his postnatal future."⁸⁹ The individual in the womb is now seen, in the light of increased scientific evidence, as physically and intellectually in a continuum with the individual after birth. The most fundamental way the prenatal past could affect the individual's postnatal future would be if it were killed in the womb. The thrust of modern medicine is to assure that the individual will not be killed, but will be given maximum protection: "We may not ever be able to guarantee a perfect uterine environment for every baby, but certainly, at this very time, by doing what is necessary, we can see to it that every

84. "Liley's pioneering work not only has opened new avenues in the treatment of erythroblastosis fetalis, but has inspired the whole new subspecialty of 'fetology' and created a need for fetological surgeons and fetological medical specialists for the future." Montague, *Hemolytic Disease of the Fetus*, in *INTRA-UTERINE DEVELOPMENT* 443, 455 (A. Barnes ed. 1968).

85. See H. LILEY, *supra* note 45, at 28.

86. *Id.* at 24.

87. *Id.* at 23.

88. *Id.* at 26-27.

89. A. MONTAGUE, *PRENATAL INFLUENCE* 500 (1962).

baby enjoys as nearly optimum a uterine environment as it is humanly possible to secure."⁹⁰ If the baby is to be assured a nearly optimum environment, he cannot be liable to destruction at the will of his parent.

Conclusion

The claim of freedom over one's body is, of course, a self-evident right if it means that a woman should be free to refuse sexual intercourse or free to practice contraception.⁹¹ A woman is not under the necessity of subjecting her body to the burden of pregnancy if she chooses either of these alternatives; but the further claim that a woman is free to destroy the being whom she has conceived through voluntary sexual intercourse makes sense only if that being can be regarded as part of herself, a part she may discard for her own good. 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.

90. *Id.*

91. *See* *People v. Belous*, 71 A.C. 996, 458 P.2d 194, 80 Cal. Rptr. 354 (1969) (dictum). In this 4-3 decision, the court held unconstitutionally vague the old California abortion statute, CAL. PEN. CODE § 274.

